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Recent Developments in D.C. Labor and Employment Law

Robert B. Fitzpatrick, Esq.[*]

I. General Civil Procedure and Evidence Rules

Rule 8 Pleading Requirements

- *Bryant v. Pepco*, 2010 U.S. Dist. LEXIS 79968 (D.D.C. Aug. 9, 2010). Judge Kessler found that the prima facie elements are "an evidentiary standard," not a "pleading standard," especially in employment cases where discovery "unearth[s] relevant facts and evidence," relying on *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). The court held that *Swierkiewicz* remains good law after *Iqbal* and *Twombly*.

- *Dave v. Lanier*, 681 F. Supp. 2d 68 (D.D.C. Feb. 3, 2010). Judge Urbina, citing *Swierkiewicz*, states that it is not necessary for the plaintiff to plead all elements of his prima facie case in the complaint or, citing *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000), to plead law or match facts to every element of a legal theory. Judge Urbina, agreeing with Judge Bates' decision in *Mitchell v. Yates*, 402 F.Supp.2d 222, 228 (D.D.C. 2005), held that nothing in *Swierkiewicz* indicates that notice pleading in discrimination cases obviates the requirement to plead short and plain statement that would put a defendant on notice of the basis of the plaintiff's claim of being an individual with a disability.

- *Rouse v. Berry*, 680 F. Supp. 2d 233 (D.D.C. Jan 29, 2010). As in *Dave*, *supra*, the court held that a plaintiff is not required to plead all elements of a *prima facie* case in his complaint, or to plead law or match facts to every element of a legal theory. Judge Roberts wrote that in an employment discrimination case based on race, it is sufficient if a complaint states "I was turned down for a job because of my race." 680 F. Supp. 2d at 263 (quoting *Potts v. Howard Univ. Hosp.*, 258 Fed. Appx. 346, 347 (D.C. Cir. 2007)). The claimant pled that he received a denial of benefits letter because he was in a wheelchair, which was a valid claim of employment discrimination under § 501 of the Rehabilitation Act.

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- *York v. McHugh*, 698 F. Supp. 2d 101 (D.D.C. Mar. 22, 2010). Judge Kollar-Kotelly held that although "detailed factual allegations" are not necessary to survive a Rule 12(b)(6) motion to dismiss, a plaintiff must include "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id*. at 104-105. Further, a plaintiff must plead more than "a sheer possibility that a defendant has acted unlawfully." *Id*.

- *Fennell v. AARP*, 2011 U.S. Dist. LEXIS 26969 (D.D.C. 2011). An African-American former employee of the AARP sued for violation of Title VII in connection with his termination. Judge Kollar-Kotelly held that at the motion to dismiss stage, dismissal is not available on the basis that the plaintiff has failed to plead the elements of a *prima facie* case of discrimination, and the plaintiff had pled facts to show a plausible entitlement to relief.

Rule 8 Pleading Requirements: *Swierkiewicz*

- *Winston v. Clough*, 712 F. Supp. 2d 1 (D.D.C. May 11, 2010). The District Court, Judge Roberts, addressed Rule 8 pleading requirements, finding that the Supreme Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), is still good law. Moreover, the court reaffirmed the holding in *Sparrow v. United Airlines, Inc.*, 216 F.3d 1111, 1118 (D.C. Cir. 2000), in which the court stated: "We understand why District Courts may want to alleviate their crowded dockets by disposing quickly of cases that they believe cannot survive in the long run. But… it may not be accomplished by employing heightened pleading standards… rather, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." With that backdrop, the court found that Plaintiff's claim sufficiently alleged facts that could be probative of a discriminatory hostile work environment by incorporating the purportedly discriminatory conduct that Plaintiff experienced and asserting that such conduct constituted a hostile work environment. The court emphasized that the Plaintiff is required to plead facts which support, not establish, the claim.

Rule 8 Pleading Requirements: Continuing Vitality of *Sparrow*; Retaliation: Threats

- *Ali v. D.C. Gov't*, 697 F. Supp. 2d 88 (D.D.C. Mar. 24, 2010). A Muslim employee of the Washington, D.C. government claimed religious discrimination, and that he was retaliated against when he filed an internal complaint. Judge Kennedy allowed the retaliation claim to proceed, though it was unlikely to succeed, where the employee alleged that a supervisor told the employee that he had to choose between his job and his religion, which implied that the employee's job was in jeopardy if he continued with the claim. The court cited and followed *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111

(D.C. Cir. 2000) in holding that a plaintiff does not need to set forth the elements of a *prima facie* case of discrimination at the initial pleadings stage.

Pleading: Proper Defendants Under the ADEA and DCHRA

- *Bennett v. Henderson*, 2011 U.S. Dist. LEXIS 8349 (D.D.C, 2011). A plaintiff brought claims for discrimination and retaliation under the Age Discrimination in Employment Act and D.C. Human Rights Act. Judge Roberts granted in part and denied in part the defendants' motion to dismiss, holding that agency or department heads are proper defendants in ADEA and DCHRA suits involving allegations of discrimination within those agencies or departments.

Pleading: Absence of Available Position

- *Rafi v. Sebelius*, 377 Fed. Appx. 24 (D.C. Cir. 2010). In a *per curiam* decision, the court upheld the lower court's ruling, finding that absence of an available position is "one of the 'most common nondiscriminatory reasons for [a] plaintiff's rejection.'" *Id*. at **3 (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

Summary Judgment

- *Colbert v. Tapella*, 677 F. Supp. 2d 289 (D.D.C. Jan 7, 2010). A defendant employer was granted summary judgment where an employee could not overcome the defendant employer's non-discriminatory reasons for hiring white males over the African American female employee. The court held that when an employer claims that a hiring decision is made on the relative qualifications between the candidates, a plaintiff must show that the plaintiff was significantly better qualified for the job than the hirees, and the qualifications gap must be great enough to be inherently indicative of discrimination. The plaintiff's subjective assessment of her own qualifications relative to the hirees is not relevant.

- *Townsend v. Mabus*, 736 F. Supp. 2d 250 (D.D.C. 2010). A pro se plaintiff former employee brought suit alleging, *inter alia*, that she suffered from a hostile work environment. Judge Huvelle granted the defendant's motion for summary judgment because the defendant submitted a detailed motion, including 26 exhibits, and the plaintiff responded with a three page opposition that failed to address any of the defendant's arguments.

- *Houston v. SECTEK, Inc.*, 680 F. Supp. 2d 215 (D.D.C. 2010). Plaintiff former employee sued the defendant employer alleging violations of Title VII and 42 U.S.C. §1981, including race discrimination, hostile work environment, and constructive discharge. Judge Roberts granted the employer's motion for summary judgment, finding that even if

the employer's stated reason for the adverse employment activity was false, the plaintiff had failed to show that discrimination was the actual reason for the activity, and that the plaintiff had failed to demonstrate that the workplace was so intolerable that it would have caused a reasonable employee to resign.

Summary Judgment: Failure to Object to Inadmissible Evidence

- *Bush v. District of Columbia*, 595 F.3d 384 (D.C. Cir. Feb. 23, 2010) (RANDOLPH, J., concurring). Judge Randolph noted in his concurrence to the majority opinion (which he also wrote) that some had observed that "denying summary judgment because the movant did not object to inadmissible evidence is to equate the movant's failure to object with a waiver of the objection at trial. There is no basis for doing so, because making an objection at the time of the motion is not required to preserve the objection at trial." 595 F.3d at 389.

Summary Judgment: Subsequent Affidavit to Explain Confusing Deposition Testimony

- *Chowdhury v. Bair*, 680 F. Supp. 2d 176 (D.D.C. Jan. 26, 2010). A former employer sued alleging religious discrimination under Title VII. The court considered a supplemental motion for summary judgment. In doing so, the court held that the claimant could utilize an affidavit to explain confusing testimony given earlier at deposition, though he could not use such an affidavit to contradict his earlier statements.

Summary Judgment: Court's Obligation to Exclude "Clearly Inadmissible" Evidence

- *Bush v. D.C.*, 595 F.3d 384, 387, 389 (D.C. Cir. Feb. 23, 2010). Judge Randolph wrote for the majority that in considering a motion for summary judgment under Rule 56, judges may not consider unsworn statements in determining whether to grant summary judgment. He went on to make the point – in a separate concurrence – that courts are required to ignore clearly inadmissible evidence that does not comply with Rule 56(e). The rule is mandatory, and not optional.

- *Williams v. Johnson*, 701 F. Supp. 2d 1 (D.D.C. Mar. 18, 2010). The plaintiff alleged that the defendants violated her rights under the First Amendment and the District of Columbia Whistleblower Protection Act by retaliating against her for statements made during a meeting with a D.C. Councilmember and for remarks made during testimony before the District of Columbia Council. Judge Kollar-Kotelly noted that she had a mandatory obligation to exclude clearly inadmissible evidence, but refused to exclude evidence where it was not clearly inadmissible and where the potentially inadmissible statements did not alter the decision of other motions pending before it.

Motion to Strike Affirmative Defenses

- *United States ex rel. Head v. Kane Co.*, 668 F. Supp. 2d 146 (D.D.C. Nov. 12, 2009). The court stated that while motions to strike are not favored, they should granted where the affirmative defense is "irrelevant and frivolous, and its removal from the case would avoid wasting unnecessary time and money litigating the invalid defense." The court noted further that when the United States is acting in the public interest or asserting a public right, it is not "bound by limitations or barred by laches."

- Melanie A. Goff & Richard A. Bales, *A "Plausible" Defense: Applying* Twombly *and* Iqbal *to Affirmative Defenses*, 34 AM. J. TRIAL ADVOC. (forthcoming Spring 2011).

Laches: Diligent Pursuit of Claim

- *Breen v. Tucker*, 2011 U.S. Dist. LEXIS 5489 (D.D.C. 2011). In 1977 the plaintiff employee brought suit against the District of Columbia for wrongful termination under Title VII. The employee won, and the District was forced to reinstate the plaintiff. The plaintiff now approaches retirement, and brought this suit alleging that the District failed to include the time in which he was unemployed in its calculation of his retirement benefits in violation of this court's order of February 27, 1981. Judge Walton found that the plaintiff has pursued his claim diligently because he only discovered the District's violation of the 1981 order in a letter he received from OPM in January of 2010, and denied the District's laches defense, but granted the District an opportunity to respond to the plaintiff's allegations on the merits.

Litigation Against D.C. Government: Section 12-309 Defense

- *Equal Rights Ctr. v. District of Columbia*, 2010 U.S. Dist. LEXIS 106559 (D.D.C. Oct. 5, 2010) (KESSLER, J.). The court found that the District had waived its defense that Plaintiff had failed to provide the District notice pursuant to D.C. Code 12-309 , because the notice requirement was not jurisdictional under *Saunders v. District of Columbia*, 2002 WL 648965, at *2 (D.D.C. Apr. 15, 2002). Judge Kessler held that non-compliance with section 12-309 must be raised as an affirmative defense or its protections are waived. Here, the District failed to raise the defense for three-and-a-half years, and accordingly Judge Kessler concluded that the District had waived the defense.

- *Payne v. District of Columbia*, 2010 U.S. Dist. LEXIS 103039 (D.D.C. Sep. 29, 2010) (KOLLAR-KOTELLY, J.). In contrast to Judge Bramen's ruling in *Cusick*, the court in *Payne* held that the 2009 amendments to the D.C. Whistleblower Protection Act were not retroactive. In so holding, the court rejected the retroactive application of the 2009 amendment which allows individual supervisors to be sued for violating the Whistleblower Protection Act. *See also Pabb v. D.C.*, 477 F.Supp.2d 185, 189 (D.D.C.

2007) (FRIEDMAN, J.); *Winder v. Erst*, 2005 WL 736639, at *9 (D.D.C. Mar. 31, 2005) (BATES, J.).

- *Blocker-Burnette v. District of Columbia*, 2010 U.S. Dist. LEXIS 82893 (D.D.C. Aug. 13, 2010) (FRIEDMAN, J.). Where Plaintiff failed to give section 12-309 notice to the mayor, the court held that Plaintiff could still proceed on the back pay, injunctive, and attorneys' fees claims, but not on any unliquidated damages claims such as compensatory or punitive damages.

- *Bonaccorsy v. D.C.*, 685 F. Supp. 2d 18 (D.D.C. Feb. 12, 2010). Judge Roberts holds as follows:

    - "The notification requirement in D.C. Code section 12-309 is strictly applied, and the provision is construed narrowly against claimants."

    - "Notice of one type of injury is not notice of another type of injury incurred in the same incident."

    - "Damages are liquidated and outside the purview of section 12-309 if they are for an easily ascertainable sum certain, such as back pay awards in discrimination cases."

    - "Unliquidated damages are damages that cannot be determined by a fixed formula and must be established by a judge or jury."

    - "Tort claims are considered unliquidated."

- *Primas v. District of Columbia*, 718 F. Supp. 2d 59 (D.D.C. June 19, 2010). As Plaintiff failed to provide the appropriate notice for her claims under the D.C. Human Rights Act, Judge Leon dismissed them.

- *Booth v. District of Columbia*, 701 F. Supp. 2d 73 (D.D.C. Apr. 1, 2010). Multiple plaintiffs sued the District of Columbia and all but two had filed notices with the mayor of their intent to sue the District of Columbia Department of Consumer and Regulatory Affairs. The defense argued that all of the plaintiffs' D.C. Whistleblower Protection Act claims must be dismissed because their notices did not mention whistleblowing or a claim pursuant to the Whistleblower Protection Act. In rejecting this argument, Judge Leon dismissed the claims of the two who filed no notice, but permitted the others to proceed, stating that "preciseness" is not required in a notice statement and that all that is required is that the mayor be made aware of the actions that led to the charges, relying on *Tolson v. District of Columbia*, 860 A.2d 336, 343 n.1 (D.C. 2004).

- *Owens v. D.C.*, 993 A.2d 1085 (D.C. Apr. 29, 2010). At trial, the Superior Court dismissed the plaintiff employee's DCHRA suit against the District of Columbia for lack of timely notice as required by section 12-309. Before the Court of Appeals, the plaintiff employee argued that the DCHRA does not specifically mention compliance with section 12-309 as a condition precedent to filing suit against the District of Columbia. The Court of appeals disagreed, noting that the legislative history of the DCHRA requires that it be read in harmony with other District of Columbia laws, rather than displacing them, and held that section 12-309 applies to claims for unliquidated damages brought against the District of Columbia under the DCHRA.

- *Elzeneiny v. District of Columbia*, 699 F. Supp. 2d 31 (D.D.C. Mar. 29, 2010) (KOLLAR-KOTELLY, J.). A plaintiff employee's DCHRA claims for unliquidated damages against the District of Columbia, including claims for pain and suffering and punitive damages, were dismissed for lack of notice under section 12-309, but her claims for liquidated damages, including claims for attorney's fees, back pay, full salary and lost retirement benefits, were allowed to stand.

- *Jones v. D.C. Dept. of Corrections*, No. 2006-CA-8663-B (D.C. Super. 2011). The plaintiffs, two homosexual employees of the defendant, brought suit under the DCHRA for hostile work environment discrimination, harassment, and retaliation. The defendant filed a motion to dismiss and a motion to sever. Judge Cordero held as follows:

    - The defendant's motion for summary judgment was denied because the defendant waived its §12-309 notice defense due to its late filing of the motion, and because it was filed long after the deadline for filing dispositive motions.

    - Plaintiffs seek damages only for incidents following 2005. Plaintiffs may allege previous incidents to support their hostile work environment claim.

    - The motion to sever was denied because the plaintiffs' claims were properly joined pursuant to Rule 20, and arose out of the "same transaction or occurrence," an alleged company-wide policy designed to discriminate against homosexuals.

Litigation Against D.C. Government: Section 5-1031(a)

- *D.C. Fire and Emergency Medical Services v. D.C. Office of Employee Appeals*, 986 A.2d 419 (D.C. 2010). D.C. Code section 5-1031(a) states:

    - "[N]o corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and

Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause."

- Here the employer sought to terminate the employee, an ambulance driver, based on the employee's conduct regarding a specific incident. However, the employee field office found that the proceeding was untimely under the aforesaid statute. The employer argued that the respective statements of the employee and a crew member were conflicting, thus rendering the employer unable to reach a legitimate decision regarding termination of employment. The Court of Appeals, Judge Pryor writing for a unanimous panel, found, however, that between the incident and the initiation of adverse action, more than six months had passed. In the twelve days after the incident, the employee and the crew member submitted various written statements and were interviewed at length. The employer then waited five months before proposing to remove the employee. There was no substantial conflict between the respective statements. The employee's statements concerning her behavior were evasive and sometimes inconsistent. The crew member was simply more forthcoming. Their different versions did not conflict. Accordingly, the decision of the Superior Court was affirmed, a decision that had upheld the decision of the Office of Employee Appeals which had reversed the termination of the employment of the FEMS employee.

Evidence: After-Acquired Evidence Defense

- *Kapche v. Holder*, 714 F. Supp. 2d 109 (D.D.C. May 29, 2010). A jury awarded the plaintiff one hundred thousand dollars ($100,000.00) in compensatory damages on his claims of discrimination and violation of the Rehabilitation Act. The plaintiff then filed a motion for back pay and either instatement or front pay. The defendant, the Federal Bureau of Investigations, relied on after-acquired evidence in arguing that the plaintiff should be entitled to no equitable relief because the FBI revoked a conditional offer of employment upon a finding of lack of candor by the plaintiff in the application process. Judge Robertson agreed with the FBI, holding that it properly invoked the after-acquired evidence defense.

Evidence: Attorney-Client Privilege

- *Duran v. Andrew*, 2010 U.S. Dist. LEXIS 33178 (D.D.C. Apr. 5, 2010). Judge Kay considered a non-party's motion to quash subpoena. The subpoena was directed to a partner in a law firm representing non-party U.S. Soybean Export Council (USSEC). USSEC employed the parties to the underlying dispute for alleged defamation and injurious falsehood. USSEC had hired the law firm to conduct a study into allegations of sexual harassment at USSEC, and the study was the subject of the subpoena. The court granted the motion in part and denied it in part, noting that USSEC was not a party to the

underlying litigation. The court held that portions of the report containing witness interviews and background information should be provided to the movant, while the remaining portions, including the law firm's conclusions and recommendations to USSEC, should be redacted.

Premature Suit; Exhaustion/Claim Arising After Filing of Formal Administrative Complaint

- *Murthy v. Vilsack*, 609 F.3d 460 (D.C. Cir. June 25, 2010). A minority veterinarian who was repeatedly denied promotions by the Department of Agriculture filed suit against the Department, and was instrumental in initiating a class charge with the Equal Employment Opportunity Commission by Asian/Pacific Islander employees. The class settled with the Department, but the veterinarian did not learn of the settlement until the time to object had passed. The veterinarian then filed a notice of breach of the settlement agreement with the EEOC, and filed a complaint in District Court one hundred and thirty one (131) days later. The District Court granted summary judgment against the veterinarian because he failed to wait the mandatory one hundred and eighty (180) days after filing a charge with the EEOC, as required by U.S.C.S. section 2000e-16, before filing suit in federal court, absent final action by the EEOC. The Court of Appeals, with Judge Rogers writing, affirmed the District Court's ruling.

Federal Sector: Losing Administrative Claims Can Be Pursued *de novo* Without Including Successful Administrative Claims

- *Payne v. Salazar*, 619 F.3d 56 (D.C. Cir. Sep. 7, 2010) (GARLAND, J.). A Department of the Interior employee brought religious discrimination claims. The EEOC found that the Department had violated Title VII by refusing to grant weekend time off for the employee to attend religious events, but rejected the employee's claim for retaliation. The employee appealed the retaliation ruling to District Court, where the Department argued, and the court agreed, that the employee had to re-litigate her religious discrimination claim, that had already succeeded before the EEOC. The Court of Appeals reversed, holding that an employee did not have to re-litigate successful claims in order to appeal rejected claims.

Federal Sector: Exhaustion: Voluntary Dismissal of a Request for an Administrative Hearing

- *Augustus v. Locke*, 699 F. Supp. 2d 65 (D.D.C. Mar. 29, 2010). A Department of Commerce employee brought race and sex discrimination claims, as well as a retaliation claim, under Title VII. The court denied the Department's motion for summary judgment for failure to exhaust administrative remedies as to the race and sex discrimination claims, but granted summary judgment as to retaliation claim where the employee

brought her race and sex claims before the EEOC, assisted in the investigation, and waited more than 180 days to file suit. Judge Sullivan was not swayed by the Department's argument that the employee's voluntary dismissal of a request for an administrative hearing constituted an abandonment of the administrative process. In so holding, the court followed *Brown v. Tomlinson*, 462 F. Supp. 2d 16 (D.D.C. 2006) (FRIEDMAN, J.), which held that "a plaintiff may withdraw from an administrative hearing after cooperating with an agency's investigation for 180 days." The retaliation claim was not allowed because it was raised subsequent to the initial discrimination claim, less than 180 days before filing suit.

Statute of Limitations: Notice of Definitive Termination Date

- *Cesarano v. Reed Smith, LLP*, 990 A.2d 455 (D.C. Mar. 4, 2010). The court, Judge Reid writing for a unanimous panel, affirmed the trial court's dismissal of Plaintiff's employment discrimination claims under the District of Columbia Human Rights Act and the District of Columbia Family and Medical Leave Act. The Court of Appeals reversed the dismissal of Plaintiff's wrongful discharge claim. Plaintiff was an associate at a law firm. The trial court had found that the associate's time of discharge was fixed on May 16, 2002 when she received her associate review and was informed that she would need to bill 200 hour-months in order for her superior to make the argument to "keep [her] around." The Court of Appeals disagreed with the trial court's characterization of that incident as notice of termination which would trigger the one year statute of limitations under the D.C. Human Rights Act, relying upon prior decisions of the court in *Stephenson v. American Dental Association*, 789 A.2d 1248 (D.C. 2002), and *Barrett v. Covington & Burling, LLP*, 979 A.2d 1239 (D.C. 2009), which clearly state that the notice of termination must be "unequivocal," "final," or "definite." The action and words of the law firm as of May 16, 2002 were not unequivocal, final, or definite notice of termination.

Statute of Limitations: Multiple Adverse Employment Actions

- *Zelaya v. UNICCO Serv. Co.*, 733 F. Supp. 2d 121 (D.D.C. Aug. 20, 2010). A plaintiff former employee sued a former employer and supervisor alleging violations of Title VII and the DCHRA, including a claim for retaliation in revoking health insurance benefits. The court found that the retaliation claim was barred by the statue of limitations in Title VII entirely, and the statute of limitations in the DCHRA in part. The DCHRA claim was allowed to stand because the employee claimed that her benefits were withheld on two separate occasions months apart, and the court held that "each retaliatory adverse employment decision constitutes a separate, actionable unlawful employment practice."

Stay of Proceedings: Similar Case in D.C. Court of Appeals

- *Fonville v. District of Columbia*, No. 02-2353, 2011 U.S. Dist. LEXIS 19084 (D.D.C. Feb. 28, 2011). A Commander in the D.C. Metropolitan Police Department challenged his demotion to Captain, claiming that the Commander had a property interest in his position. Judge Sullivan granted the defendant's motion to stay the proceedings because two similar cases had been appealed to the D.C. Court of Appeals, the outcomes of which would be extremely persuasive to the *Fonville* court.

II. Discovery

Discovery: Privilege Log

- *Zelaya v. UNICCO Serv. Co.,* 682 F. Supp. 2d 28 (D.C. Cir. Jan. 28, 2010). A plaintiff former employee sued a former employer and supervisor alleging gender discrimination and retaliation. The plaintiff filed a motion to compel production of documents regarding two sets of documents, seeking all claims of gender discrimination against the employer from January 1, 2004 to the time of the discover request, January 9, 2009. The employee was employed from December, 2004 through April, 2007. Prior to the motion, the parties had agreed to limit the scope of discovery to the region where the plaintiff was employed, and the time that the plaintiff was employed with the defendant. When the defendant produced three redacted allegations, the plaintiff filed its motion, seeking complaints company-wide, and unredacted versions of the allegations already produced. The employer claimed attorney-client privilege over sixteen relevant documents. The court held as follows:

    - That "evidence of an employer's past discriminatory or retaliatory behavior toward other employees may be relevant to whether an employer discriminated or retaliated against a plaintiff," but here the plaintiff did not submit sufficient evidence to demonstrate that discrimination claims outside her region of employment were relevant.

    - That the temporal scope of the discovery request was acceptable, running from shortly before the time of employment to less than two years after.

    - Finally, that the parties' agreement to limit the scope of discovery did not bar the plaintiff from subsequently seeking broader discovery.

Discovery: Duty to Specify Records

- *Fudali v. Pivotal Corp.*, No. 03-1460, 2011 U.S. Dist. LEXIS 3709 (D.D.C. Jan. 14, 2011). In considering a motion for contempt and sanctions arising out of a post-judgment

discovery dispute, Judge Facciola held that a responding party has a duty to specify, by category and location, the records from which answers to interrogatories can be derived. *Id*. at *8 (citing *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 325-26 (N.D. Ill. 2005); *Morin v. Nationwide Fed. Credit Union*, 229 F.R.D. 364, 366 (D. Conn. 2005); *Cambridge Elecs. Corp. v. MGA Elecs., Inc.*, 227 F.R.D. 313, 323 (C.D. Cal. 2004); *Pulsecard, Inc. v. Discover Card Svcs.*, 168 F.R.D. 295, 305 (D. Kan. 1996)).

Electronically Stored Information

- *D'Onofrio v. SFX Sports Group, Inc.*, 256 F.R.D. 277 (D.D.C. Aug. 24, 2010). A discovery dispute erupted in a case in which a plaintiff former employee claimed she was terminated because she was pregnant. The employee sought electronic documents from the defendant employer, and the related motion for protective order was referred to another judge. The defendant filed its privilege log under a protocol established by the court. Counsel for the defendants offered to provide a copy of attorney notes taken while conducting the privilege review on the condition that only the employee's attorneys could see it. The employee objected, but Judge Facciola allowed it because the employer showed good cause why the plaintiff should not see the notes.

III. Employment Discrimination, Related Procedural and Evidence Rules, and Related Claims

Retaliation

- *Thomas v. Vilsack,* 718 F. Supp. 2d 106 (D.D.C. June 22, 2010).A plaintiff employee sued the department of agriculture for violations of Title VII based on race, sex, and retaliation. The employee claimed she was discriminated against when the Department paid her at a lower rate than white males in the same position, and that the Department retaliated by removing her as Chief Information Officer (CIO), reassigning her to a position with few responsibilities, and rejecting her application for promotion to the CIO position when it was upgraded to the Senior Executive Services (SES) level.
    - Judge Kay granted the Department's motion for summary judgment as to the pay discrimination claim because the Department demonstrated that the difference in salaries was justified by legitimate factors other than sex and race.
    - The court granted the Department's motion for summary judgment as to the employee's removal from the CIO position because the employee failed to contact an EEO councilor within 45 days of the adverse action, as required by 29 C.F.R. section 1614.105(a)(1).

- The court denied the Department's motion for summary judgment as to the remaining claims.

- *Hampton v. Vilsack*, 2011 U.S. Dist. LEXIS 3176 (D.D.C. 2011). An African-American plaintiff former employee sued the U.S. Department of Agriculture for racial discrimination, retaliation, and a hostile work environment in violation of Title VII. The plaintiff had participated in a class action suit alleging racial discrimination against the USDA that settled in the 1990s, and he filed another EEO complaint in 1996 that settled before 2000. Between 2002 and 2004, the plaintiff was the subject of investigations regarding printing sexually explicit emails on USDA printers, a potential conflict of interest regarding a USDA grant that plaintiff applied for, and allegations that the plaintiff falsified hotel receipts to receive extra reimbursement. Judge Huvelle granted in part and denied in part defendant's motion for summary judgment, holding as follows:

  - Plaintiff's claim that he was discriminated against in his non-selection for a foreign assignment could not be dismissed because plaintiff had raised a genuine issue of material fact as to the reason for his non-selection where plaintiff alleged that a personnel management specialist said that he was not being sent overseas because of his EEO complaint.

  - Jokes and comments about plaintiff's race by plaintiff's supervisor constituted "stray remarks," and were therefore insufficiently severe or pervasive to create an abusive work environment.

  - Plaintiff's claims of racial discrimination by his direct supervisor were inadequate because the supervisor merely initiated investigations based on reports from other USDA employees.

  - Decisions not to prosecute the plaintiff by the Office of Inspector General and the Department of Justice had no bearing on charges brought by the USDA.

  - Direct evidence of retaliation can be negated at the summary judgment stage if an employer can demonstrate that it would have reached the same decision absent the prohibited discrimination, and a suggestion that retaliation is among the factors motivating an adverse action is insufficient to defeat summary judgment.

Retaliation: Delay in Providing Accommodation in ADA Case

- *Mogenhan v. Napolitano*, 613 F.3d 1162 (D.C. Cir. July 27, 2010). A Secret Service employee who suffered from migraines filed a discrimination claim after receiving low employment rating scores, alleging that the scores were based on her sex and disability. The employee's supervisor then posted the employee's complaint on the agency's

internal network so that other employees could see the document. The supervisor also increased the employee's workload to five or six times that of other employees so that she would be "too busy to file complaints." The District Court dismissed the employee's retaliation claim on the grounds that, for retaliatory conduct to be actionable, it must meet the same level of adversity required for discriminatory conduct, involving "materially adverse consequences affecting the terms, conditions, or privileges of employment." The D.C. Circuit, with Judge Garland writing for the court, reversed this holding. Instead, Judge Garland wrote, the court should have determined whether "a reasonable employee would have found the challenged action materially adverse," meaning "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The D.C. Circuit affirmed the district court's dismissal of the discrimination claim because there was no genuine dispute that the employer had reasonably accommodated the employee's disability.

Retaliation: Transfer; Materially Adverse

- *Pardo-Kronemann v. Donovan*, 601 F.3d 599 (D.C. Cir. Apr. 16, 2010) (TATEL, J.). A Housing and Urban Development employee sued, alleging that a transfer within HUD was retaliation in violation of Title VII. The Court of Appeals for the D.C. Circuit held that HUD's failure to discuss the transfer with the employee, failure to explain the reassignment, and a HUD official's questionable EEO testimony would allow a reasonable jury to conclude that HUD transferred the employee in retaliation for prior EEO activity, and that the employee raised a genuine issue of material fact as to whether the transfer was retaliation.

Retaliation: Materially Adverse; Context-Specific

- *Herbert v. The Architect of the Capitol*, 2011 U.S. Dist. LEXIS 17422 (D.D.C. 2011). An African-American plaintiff employee sued the Architect of the Capitol, alleging racial discrimination and retaliation in violation of Title VII. Judge Kollar-Kotelly granted the Architect of the Capitol's motion to dismiss, and held that the question of whether employer action is materially adverse is context-specific. Here, a reprimand letter, an allegedly delayed promotion, and the launching of an internal investigation were not materially adverse actions under Title VII.

Retaliation: Knowledge of Protected Activity

- *Barnabas v. Bd. of Trs. of the Univ. of the Dist. of Columbia*, 686 F. Supp. 2d 95 (D.D.C. Mar. 1, 2010). A plaintiff former employee of the University of the District of Columbia brought suit alleging age discrimination and retaliation in violation of the Age Discrimination in Employment Act. In its motion for summary judgment, UDC claimed that the plaintiff's supervisors who allegedly retaliated against her were not aware of the

plaintiff's protected activity. The court was not convinced, noting that "to survive summary judgment a plaintiff "needn't prove direct evidence that his supervisors knew of his protected activity; he need only offer circumstantial evidence that could reasonably support an inference that they did." 686 F. Supp. 2d at 106, n.10 (quoting *Jones v. Bernanke*, 557 F.3d 670, 679 (D.C. Cir. 2009)).

Retaliation: Difference Between a Retaliation Claim and a Hostile Work Environment Claim

- *Baird v. Snowbarger*, 2010 U.S. Dist. LEXIS 109091 (D.D.C. Oct. 13, 2010). In dismissing a hostile work environment claim, the court analyzed the employer's alleged behavior, including numerous insulting emails, alleged failures to investigate previous complaints, and failure to take corrective action when an employer's representative yelled at the employee in deposition. The court noted that, while these activities could form the basis of a retaliation claim, they could not support a hostile work environment claim, holding that "the acts that plaintiff complains about are simply not the type of 'discriminatory intimidation, ridicule, and insult' that are 'sufficiently severe or pervasive to alter the conditions of [her] employment, and create an abusive working environment.'" 2010 U.S. Dist. LEXIS 109091 at *39 (quoting *Baloch v. Kempthorne*, 550 F.3d 1191, 1201 (D.C. Cir. 2008)).

Retaliation: Protected Activity: Participation as an Unnamed Member of a Title VII Class Action

- *Benjamin v. Duncan*, 694 F. Supp. 2d 1 (D.D.C. Mar. 17, 2010). The plaintiff employee, who alleged racial discrimination and retaliation under Title VII, was a former participant in a class action suit against the employer brought by African-American employees for racial discrimination. The court held that the employer's action in giving the employee a merely "successful" performance rating did not constitute a "materially adverse" action, and that even a poor evaluation is typically not considered an adverse action in the context of retaliation. Moreover, the employee failed to allege a causal connection between her non-selection for a position in 2003, and her participation in the class action suit, which concluded in 2001.

Retaliation: Protected Activity: Good-Faith Request for an Accommodation

- *Gard v. United States Dep't of Educ.*, 691 F. Supp. 2d 93 (D.D.C. Mar. 5, 2010). A plaintiff former employee sued the U.S. Department of Education alleging, among other things, that the Department discriminated against him by failing to accommodate his alleged disabilities, and that the Department retaliated against him for requesting an accommodation. The court dismissed the employee's claim for failure to accommodate because the employee refused to provide updated medical records to the Department, but

held that the employee's good-faith request for accommodation was protected activity, and thus that the employee could prevail on his retaliation if he was able to offer evidence that it was his filing of a discrimination complaint, rather than his failure to provide medical records, that caused the Department to deny him a reasonable accommodation.

Retaliation: Failure to Notify Employer of Need for Accommodation

- *Hovsepyan v. Blaya*, 2011 U.S. Dist. LEXIS 28149 (D.D.C. 2011). A pro se former plaintiff employee sued his former employer, the Voice of America (VOA) alleging age discrimination, disability discrimination following a heart attack, and retaliation. Judge Collyer dismissed all of the plaintiff's claims except for retaliation, holding as follows:
    - The plaintiff's disability discrimination claim could not stand because the plaintiff never notified the VOA that he required an accommodation.
    - The plaintiff's age discrimination claims were effectively rebutted by the VOA's evidence that the plaintiff was terminated for insufficient job performance, and inability to abide by a performance improvement plan. Further, the plaintiff failed to allege that the fact that the performance standards in the PIP were not reasonably attainable had anything to do with his age.
    - Despite the plaintiff's failure to plead the facts constituting his retaliation claim, the court noted that it was obliged to consider the totality of a pro se litigant's filings, and that the plaintiff had documented a retaliation claim in the administrative record. The court therefore denied the VOA's motion for dispositive relief and appointed counsel to amend the complaint as to the surviving claim.

Retaliation: Temporal Proximity

- *Jarmon v. Genachowski*, 720 F. Supp. 2d 30 (D.D.C. July 2, 2010). Judge Sullivan stated that while the D.C. Federal District Court has "often stated that three months is the outer bound," he went on to emphasize that the three months requirement applies "only where a plaintiff is relying *solely* on temporal proximity to prove causation."

- *Williams v. Dodaro*, 691 F. Supp. 2d 52 (D.D.C. Mar. 5, 2010). The District Court, Judge Bates, denied the employer's motion for summary judgment in part because of the close temporal connection between the employee's protected activity and her termination. The court cited the holding in *Holcomb v. Powell*, 433 F.3d 889, 903 (D.C. Cir. 2006), that where a plaintiff "'repeatedly engaged in protected activity' in 'close temporal proximity' to the adverse action, the plaintiff satisfied her burden of providing evidence supporting an inference of retaliatory motive." The employee's protected activity, surviving a

motion for summary judgment brought by the employer, came just two and a half months prior to the employee's termination.

- *Pendleton v. Holder*, 697 F. Supp. 2d 12 (D.D.C. Mar. 22, 2010). The District Court, Judge Bates granted the employer's motion for summary judgment against a retaliation claim where the only argument that the plaintiff former employee offered to demonstrate retaliation was that he engaged in protected activity while engaging in the selection process for a promotion he did not receive. Judge Bates held that temporal proximity alone is insufficient to establish pretext and rebut a legitimate reason for non-selection. To hold otherwise would effectively grant employees a period of immunity "during which no act, however egregious, would support summary judgment for the employer in a subsequent retaliation claim." 697 F. Supp. 2d at 29 (*quoting Woodruff v. Peters*, 482 F.3d 521, 530 (D.C. Cir. 2007)).

- *Benjamin v. Duncan*, 694 F. Supp. 2d 1 (D.D.C. Mar. 17, 2010). An employee alleged discrimination based on race and gender, and retaliation for participating in a previous class action suit. The District Court, Judge Friedman, granted the employer's motion for summary judgment, and held that a three year gap between the employee's non-selection and the conclusion of her protected activity (participation in the class action) was too great to support an inference of retaliation. Judge Friedman noted that courts have "seldom allowed periods of more than a year to create the inference of a causal connection." 694 F. Supp. 2d at 22 (*quoting Moses v. Howard Univ. Hosp.*, 474 F. Supp. 2d 117, 125 (D.D.C. 2007)).

- *Gilbert v. Napolitano*, 2011 U.S. Dist. LEXIS 3139 (D.D.C. 2011). The plaintiff employee sued Customs and Border Protection for race discrimination and retaliation in violation of Title VII, and age discrimination in violation of the Age Discrimination in Employment Act. The plaintiff's allegations arose from non-selection for several positions over several years. Judge Leon granted the defendant employer's motion for summary judgment after analyzing each non-selection, and found that the plaintiff did not produce anything on the record demonstrating that he was significantly more qualified than the selectees. In addition, the three year gap between the plaintiff's prior EEO activity and his non-selection for the first position was too long to raise an inference of causation.

Retaliation: Failure to Raise Reasonable Inference

- *Reshard v. Lahood*, 2010 U.S. Dist. LEXIS 34426 (D.D.C. 2010). A plaintiff sued the Secretary of Transportation in his official capacity for alleged racial discrimination and retaliation. Judge Walton granted the defendant's motion for summary judgment, finding as follows:

- A letter of reprimand had been written because the plaintiff had refused to perform assigned duties and to attend staff meetings.

- The plaintiff failed to raise a reasonable inference that the defendant's reasons for not selecting plaintiff for a position were false.

- Plaintiff's allegations regarding performance evaluations were insufficient to support a claim for retaliation.

Pattern and Practice; Statistical Analysis; Constructive Discharge; and Stray Remarks

- *Aliotta v. Bair*, 614 F.3d 556 (D.C. Cir. Aug. 12, 2010). A class of former Federal Deposit Insurance Corporation employees sued the agency, claiming age discrimination in violation of the Age Discrimination in Employment Act. In an opinion by Judge Brown, the Court of Appeals for the D.C. Circuit concluded the following regarding the plaintiff class' statistical analysis of disparate treatment and impact:

  > "Both class member claims are premised almost entirely upon the statistical findings of their expert, Dr. Seberhagen. In order for class members to show a disparate effect on older workers, they must combine the effects of the *involuntary* terminations resulting from the 2005 RIF with the effects of the *voluntary* retirements from the 2004-05 buyout offers. But, as the District Court properly concluded, class members cannot include as evidence of discrimination the statistics of a group of employees who, because they voluntarily accepted a buyout, suffered no adverse employment action. Without the inclusion of the voluntary terminations, class members' claims of discrimination collapse. The statistical impact of the involuntary RIF terminations reveals a disparate effect on *younger*, not older, employees…"

  614 F.3d at 566. Regarding an FDIC buyout, the class argued that the FDIC made it clear that employees who refused the buyout would almost certainly be terminated in a reduction in force, and thus faced a constructive discharge. The court disagreed, noting that because of the complexity of the RIF procedure, employees could not calculate the likelihood of discharge under the RIF, and thus did not face an impermissible take-it-or-leave-it choice between accepting the buyout and termination.

- Finally, the court held that a statement in 2001 or 2002 made by the then-chairman of the FDIC, three or four years before the RIF, that he "want[ed] young people around [him]. . . [because] they have all the innovative ideas" and a statement by the then-chairman in 1995 that he wanted to "keep some of the youngest and brightest people who are moving up in the ranks" did not support the inference that the FDIC targeted older employees for termination or forced retirement, noting that "stray remarks of nondecisionmakers… are

not sufficient…, standing alone, [to] raise an inference of discrimination." 614 F.3d at 570 (quoting *Bevan v. Honeywell*, 118 F.3d 603, 610 (8th Cir. 1997)).

Stray Remarks: Gender Discrimination; Intentionally Discarded Interview Notes

- *Talavera v. Shah*, 2011 U.S. App. LEXIS 6299 (D.C. Cir. 2011). A plaintiff former employee of the United States Agency for International Development appealed the District Court's grant of summary judgment on her claims of gender discrimination and retaliation under Title VII. Judge Rogers, writing for the Court, affirmed the grant as to all counts except the plaintiff's 2004 non-promotion gender discrimination claim, and held as follows:

    - Statements offered by the plaintiff were not stray comments by an employer, but statements by the head of the Office of Security relating specifically to alleged gender bias on the part of a subordinate manager who was responsible for making the challenged employment decision.

    - A statement that men in the office had bonded through military service was not a stray remark, and was relevant to the plaintiff's gender discrimination claim.

    - EEOC regulations required the selecting official to keep his interview notes for one year, and a reasonable jury could conclude that the selecting official's intentional destruction of his notes supports an inference that the notes would have contained information favorable to the plaintiff's claim.

Evidence: Stark Superior Qualifications; Markedly More Qualified

- *Porter v. Shah*, 606 F.3d 809 (D.C. Cir. June 1, 2010). An African-American male employee sued the U.S. Agency for International Development (USAID) alleging discrimination on the basis of race and sex based on the outcomes of his performance assessments, denials of promotions, and alleged retaliation. In an opinion by Judge Henderson, the court held that a "stark superiority of credentials" can give rise to an inference of pretext, but the employee did not have such superior credentials. However, the employee's superior educational credentials could lead a reasonably jury to conclude that the employee was "markedly more qualified" than the selectee, throwing into doubt the reason for his non-selection.

Evidence: Comparative Qualification Cases

- *Pendleton v. Holder*, 697 F. Supp. 2d 12 (D.D.C. Mar. 22, 2010). Judge Bates granted an employer's motion for summary judgment. The plaintiff former employee brought suit for retaliation and discrimination under Title VII after he was not selected for a

promotion, and claimed that the qualifications gap between him and two selectees was "wide and inexplicable." The court disagreed, noting that while the employee had twenty five years of law enforcement experience, the selectees had at least twenty years of law enforcement experience each. The court also found that the employee's retaliation claim was based solely on the temporal proximity between his protected activity and his non-selection, and held that temporal proximity alone is insufficient to rebut a legitimate reason for non-selection.

- *Benjamin v. Duncan*, 694 F. Supp. 2d 1 (D.D.C. Mar. 17, 2010). A female African-American former employee brought suit against the Department of Education for race and sex discrimination and retaliation under Title VII. Judge Friedman granted the Department's motion for summary judgment, finding that the Department offered a legitimate, non-discriminatory reason for the employee's non-selection to a GS-14 position where the selecting official based her decision on interviews with the candidates, interviews with the plaintiff's supervisors, and firsthand knowledge of the plaintiff's performance.

- *Calhoun v. Johnson*, 2011 U.S. App. LEXIS 2387 (D.C. Cir. 2011). A plaintiff employee sued the United States General Services Administration claiming racial discrimination and retaliation in violation of Title VII after she was not selected for multiple positions that she applied for. In an opinion by Judge Garland, the U.S. Court of Appeals for the D.C. Circuit affirmed the District Court's dismissal of most of the plaintiff's claims because the plaintiff failed to show that the qualifications gap between herself and the selectees was great enough to be inherently indicative of discrimination. The court reversed dismissal of the final count because there was conflicting testimony as to the experience of the selectee.

Evidence: African-American Plaintiff Replaced by Another African-American

- *Holmes-Martin v. Sebelius*, 693 F. Supp. 2d 141 (D.D.C. Mar. 17, 2010). An African-American former employee of the Department of Health and Human Services brought suit under Title VII alleging racially motivated disparate treatment, retaliation, and a hostile work environment. Judge Urbina noted that any inference of discriminatory motive was strongly undermined by the fact that the Department transferred a significant portion of the plaintiff's duties to another African-American, and granted the Department's motion for summary judgment as to the plaintiff's disparate treatment claims related to the duties transferred to the other African-American, but denied the motion as to duties transferred to non-African-Americans.

Evidence: Pre-Selection as Evidence of Discrimination

- *Downing v. Tapella*, 2010 U.S. Dist. LEXIS 75324 (D.D.C. July 27, 2010). The District Court, Judge Huvelle, held that alleged re-selection by the Defendant was only relevant to Plaintiff's lawsuit in the event Plaintiff could demonstrate that the re-selection itself was discriminatorily motivated, noting that the Circuit has repeatedly distinguished between underlying discrimination claims and allegations of re-selection that do not directly suggest discrimination. The court went on to note that a violation of the agency's regulations does not necessarily result in a finding of discrimination, relying on the Circuit's decision in *Johnson v. Ouhman*, 679 F.2d 918, 931-22 (D.C. Cir. 1982).

Evidence: Background Checks

- *America v. Mills*, 714 F. Supp. 2d 88 (D.D.C. May 28, 2010). A plaintiff employee settled his racial discrimination and retaliation claims against the U.S. Small Business Administration (SBA), and then sued, alleging that the SBA breached the agreement. The basis for the plaintiff's claim for breach was that the plaintiff failed to find a job because the SBA did not provide neutral references for the plaintiff as required by the agreement. Judge Friedman found that the SBA breached the agreement by failing to forward reference calls to the SBA's human resources department, as required by the agreement, but that the breach by the SBA was immaterial. In a reference call an SBA employee said that the plaintiff engaged in an "internal battle" regarding a potential transfer that was a "tough experience," that "he may not be the guy to take it to the next level" and "I don't think he got along with everybody the way he got along with me," but other statements provided by the SBA employee were positive, calling the plaintiff "very bright think tank-type of individual," a "very good guy," "very smart," a "high level thinker," and "very good about identifying ideas." Because the breach was immaterial, the court refused to rescind the agreement and reinstate the plaintiff's claims.

Evidence: Claims Barred on Exhaustion Grounds as Evidence

- *Manuel v. Potter*, 685 F. Supp. 2d 46 (D.D.C. 2010). A plaintiff former employee sued the Postmaster General alleging discrimination based on race and national origin, retaliation, and constructive discharge. Judge Walton held that claims made before October 13, 2006, were barred on exhaustion grounds, but the court could consider those events as background evidence. Judge Walton granted summary judgment to the defendant on the remaining claims because the plaintiff failed to support his allegations with anything other than his own statements.

Disparate Impact; Statistics

- *Menoken v. Berry*, 2010 U.S. App. LEXIS 21290 (D.C. Cir. Oct. 13, 2010). An African-American female appealed from a lower court decision granting summary judgment for the defendant U.S. Office of Personnel Management. The plaintiff's claims were for discrimination under Title VII for non-selection to an administrative law judge position. In a *Per Curiam* decision, the U.S. Court of Appeals affirmed the lower court's decision, noting that OPM had abandoned a practice held to have had a disparate impact in a previous ruling, that statistics presented by the plaintiffs failed to show a discriminatory impact on women or African-Americans, and that the plaintiff failed to show that she was affected by OPM policies.

Disparate Impact: Adverse Employment Action Required

- *Young v. Covington & Burling LLP*, 2010 U.S. Dist. LEXIS 98835 (D.D.C. Sep. 21, 2010). The pro se plaintiff attorney sued Covington & Burling, LLP alleging race discrimination in violation of Title VII and the DCHRA. Judge Walton granted the defendant's partial motion for summary judgment regarding the initial hiring components of the plaintiff's disparate impact claim, finding that the plaintiff suffered no injury because she was selected for the position she applied for.

Disparate Impact: Pseudofolliculitis Barbae (Razor Bumps)

- *Antrum v. Wash. Metro. Area Transit Auth.*, 710 F. Supp. 2d 112 (D.D.C. May 10, 2010). The District Court, Judge Bates, granted the Defendant's motion for summary judgment in a disparate impact case, finding that Plaintiff had failed to produce evidence that pseudoffolliculitis barbae (PFB) disproportionately affects African-American men. The District Court went on to state that even if PFB predominantly occurs among African-Americans, Plaintiff could not demonstrate that African-Americans suffered a disparate impact under WMATA's no-beard rule as WMATA's rule was not rigid. Indeed, WMATA's rule specifically permitted individuals with PFB to grow beards so long as they obtain documentation of their PFB from a dermatologist.

Disparate Impact: Reliance on U.S. News & World Report Law School Rankings and Applicant's Ties with Dallas, TX

- *Onyewuchi v. Gonzalez*, 267 F.R.D. 417 (D.D.C. Mar. 17, 2010). The pro se plaintiff, an African American attorney and naturalized citizen, sued the U.S. Citizen and Immigration Services for discrimination based on race and national origin in a non-selection. In the opinion by Judge Urbina, the court considered the plaintiff's motion to amend his amended complaint and to reopen discovery. The court denied the motion, finding that the plaintiff was already aware of the information underlying his proposed disparate

impact claims long before e-mails came to light which plaintiff alleged alerted him to the claims. The court cited information the plaintiff included in his original amended complaint, including allegations that reliance on the U.S. News and World Report law school rankings, which rank historically black law schools in the bottom tier, created a disparate impact.

Rehabilitation Act

- *Stewart v. St. Elizabeths Hospital*, 589 F.3d 1305 (D.C. Cir. Jan. 5, 2010). A former employee sued St. Elizabeths Hospital for failure to accommodate her disability in violation of the Rehabilitation Act. The District Court granted summary judgment in favor of St. Elizabeths, and the plaintiff appealed. In an opinion written by Judge Kavanaugh, the U.S. Court of Appeals affirmed, holding that St. Elizabeths did not deny the plaintiff an accommodation. The defendant initially did not have notice of the plaintiff's disability, and after receiving notice, an administrator met promptly with the plaintiff, and said he would attempt to accommodate the plaintiff as soon as she submitted the necessary paperwork.

- *Adair v. Solis*, 742 F. Supp. 2d 40 (D.D.C. 2010). Plaintiff former employee brought suit for racial discrimination under Title VII and violations of the Rehabilitation Act, and sought review of the affirmation of his termination by the Merit System Protection Board. Judge Sullivan held as follows:

    - The plaintiff's claims of clinical depression did not rise to the level of limitation of a major life activity.

    - The plaintiff failed to rebut substantial evidence on the record that he was terminated for, among other things, stating during a meeting that he "would rather see everyone dead and the whole world destroyed" than suffer disrespect.

    - The decision of the MSPB was supported by law, was not arbitrary and capricious, and was not obtained in violation of the plaintiff's procedural rights.

Rehabilitation Act: Causation Analysis After Gross: Request for Current Medical Information

- *Gard v. United States Dep't of Educ.*, 2010 U.S. Dist. LEXIS 123867 (D.D.C. Nov. 23, 2010). A pro se plaintiff sued the U.S. Department of Energy for alleged retaliation under the Rehabilitation Act after the plaintiff's underlying claim that he was denied reasonable accommodation was dismissed. Judge Collyer granted the Department's motion for summary judgment, finding that the plaintiff's refusal to provide current medical records was the reason the Department denied him a reasonable accommodation. Following

Gross v. FBL Financial Services Inc., 129 S. Ct. 2343 (2009) the court held that "a plaintiff seeking vindication under the Rehabilitation Act must prove that his disability was the 'sole' or 'but-for' reason for the employer's actions or inactions, regardless of whether the plaintiff advances a claim of discrimination based on disparate treatment, mixed-motive, or retaliation." 2010 U.S. Dist. LEXIS 123867 at *15.

Rehabilitation Act: Compatibility With Disability Benefits Claims

- *Solomon v. Vilsack*, 628 F.3d 555 (D.C. Cir. 2010). The District Court granted the defendant's motion for summary judgment in its entirety, declining to separately address the plaintiff's distinct retaliation claims under the Age Discrimination in Employment Act because it concluded that that plaintiff's claim for disability benefits and her claim that she had been discriminated against under the Rehabilitation Act were mutually exclusive. In an opinion by Judge Tatel, the U.S. Court of Appeals for the D.C. Circuit vacated and remanded, holding that the plaintiff's claim for disability benefits and her Rehabilitation Act claim did not inherently conflict, and thus her Rehabilitation Act claims were not barred.

Faragher/Ellerth Defense After Taylor v. Solis

- *Rogers v. Mabus*, 699 F. Supp. 2d 73 (D.D.C. Mar. 29, 2010). A plaintiff former employee brought a sexual harassment suit against the Navy. After its motion to dismiss was denied, the Navy filed a motion for reconsideration. Judge Sullivan, citing *Taylor v. Solis*, 571 F.3d 1313, 1319 (D.C. Cir. 2009), wrote that a "plaintiff must act as a reasonable employee would act if she believed she was being sexually harassed. Compliance with the agency's sexual harassment policies is required, as well as prompt reporting of the incident(s)." 699 F. Supp. 2d at 80. Unlike *Taylor*, however, the court found that the Navy policy lacked guidance on how to report allegations of sexual harassment or to whom such allegations should be made, and that the plaintiff was confused about the policy. The court then denied the Navy's motion.

- *Brown v. District of Columbia*, 2011 U.S. Dist. LEXIS 20404 (D.D.C. 2011). At the close of evidence, the plaintiff orally moved for judgment on the defendant's *Faragher-Ellerth* defense to plaintiff's hostile work environment sexual harassment claim, or, in the alternative, whether the plaintiff sustained an adverse tangible employment action. Judge Kay treated the motion as a motion for judgment as a matter of law, and found that the defendant presented evidence of sexual harassment policies in place at the time of the alleged harassment, and that no tangible employment action was taken against the plaintiff. The court denied the motion.

ADEA: Section 2(c) of the Basic Authorities Act

- *Miller v. Clinton*, 2010 U.S. Dist. LEXIS 117434 (D.D.C. Nov. 4, 2010). A State Department former employee and U.S. citizen working in Paris was terminated when he turned sixty five (65) years old, and brought suit under the Age Discrimination in Employment Act. The employee had been working under a Local Compensation Plan (LCP) which included a mandatory retirement clause, as was the prevailing practice among employers in France. Section 2(c) of the Basic Authorities Act specifically states that covered employees are not to be considered U.S. Government employees for purposes of OPM-administered laws. Judge Huvelle held that by the language of Section 2(c) the employee was also not a U.S. government employee for the purposes of non-OPM-administered laws, including the ADEA. The court then granted the State Department's motion to dismiss.

Title VII: Security Clearances

- *Ciralsky v. CIA*, 689 F. Supp. 2d 141 (D.D.C. Feb. 26, 2010). A Jewish former employee brought twenty claims, including religious discrimination under Title VII, against eleven defendants, including the Central Intelligence Agency. The plaintiff had obtained a top secret security clearance prior to beginning his employment at the CIA, and shortly after he began the Agency initiated a reinvestigation of the plaintiff's security clearance. The Agency then revoked the plaintiff's security clearance, citing plaintiff's failure to disclose required information, and he was terminated. In dismissing the plaintiff's Title VII claims, Judge Shanstrom followed *Ryan v. Reno*, 168 F.3d 520 (D.C. Cir. 1999) and held that adverse employment actions based on denial or revocation of a security clearance are not actionable under Title VII, and that federal agencies are shielded from judicial scrutiny of the security clearance process. The court rejected the plaintiff's argument that his suit was based on his termination by the CIA, rather than his revoked security clearance, because the two could not be viewed as unrelated events.

Title VII: Venue: Premature Suit

- *Noisette v. Geithner*, 693 F. Supp. 2d 60 (D.D.C. Mar. 12, 2010). The plaintiff employee sued alleging racial discrimination and retaliation in violation of Title VII. Judge Roberts dismissed the complaint without prejudice, finding that the plaintiff filed suit before the Equal Employment Opportunity Commission ruled on his withdraw request regarding his EEO claims, and that the plaintiff failed to wait 180 days from the day he filed his appeal to file suit, and thus that he had failed to exhaust his administrative remedies.

Title VII: Continuing Violations

- *Drewrey v. Clinton*, 2011 U.S. Dist. LEXIS 7367 (D.D.C. 2011). An African-American plaintiff employee sued the State Department for racial discrimination and retaliation in violation of Title VII. Judge Urbina granted the Department's motion for summary judgment because the plaintiff failed to initiate contact with an EEO counselor within 45 days of the allegedly discriminatory contact. Judge Urbina also noted that the Supreme Court rejected the continuing violations doctrine, which allowed a suit to include discriminatory or retaliatory acts that were related to at least one act falling within the charge filing period.

Title VII: Racial Discrimination Distinguished From National Origin Discrimination

- *Ndondji v. Interpark, Inc.*, 2011 U.S. Dist. LEXIS 23668 (D.D.C. 2011). An African-American plaintiff from Angola brought suit against the defendant company for alleged discrimination on the basis of national origin and retaliation in violation of 42 U.S.C. §1981, Title VII, and the D.C. Human Rights Act. Judge Bates held as follows:
    - Plaintiff's claim under §1981 could not stand because the plaintiff failed to allege racial discrimination, and race and national origin are ideologically distinct categories.
    - The plaintiff's Title VII claims for discrimination based on national origin were valid, but the remainder of the plaintiff's claims were barred because he failed to exhaust his administrative remedies.
    - The plaintiff's allegations that he was moved to difficult locations, was deprived of adequate subordinates, was overworked, was spied on by management, was placed on a performance improvement plan, and faced reprimands from management did not constitute adverse employment actions.
    - The plaintiff's did not fail to exhaust administrative remedies under the DCHRA because nothing in the plain language of the DCHRA suggests that an exhaustion requirement applies to non-District of Columbia government employees.

Lilly Ledbetter Fair Pay Act: Denial of Promotion

- *Schuler v. PriceWaterhouseCoopers, LLP*, 595 F.3d 370 (D.C. Cir. Feb. 16, 2010). The D.C. Circuit, with Judge Ginsburg writing for a unanimous panel, held that plaintiffs may not pursue claims under the Lilly Ledbetter Fair Pay Act in which they argue that an earlier failure to promote adversely affected their compensation. The court found that the LLFPA only applies to discriminatory compensation claims, not to failure-to-promote

claims. Plaintiff had argued that the failure to promote was an "other act" within the meaning of section 4 of the LLFPA. The court specifically held: "In context, therefore, we do not understand 'compensation decision or other practice' to refer to the decision to promote one employee but not another to a more remunerative position."

- *Barnabas v. Bd. of Trs. of the Univ. of the Dist. of Columbia*, 686 F. Supp. 2d 95 (D.D.C. Mar. 1, 2010). A plaintiff former employee sued the University of the District of Columbia for age discrimination and retaliation. Judge Bates rejected the plaintiff's argument that the Lilly Ledbetter Fair Pay Act revived the plaintiff's discrimination claim for non-promotion in 2004, holding that "the decision whether to promote an employee to a higher paying position is not a 'compensation decision or other practice' within the meaning of that phrase in the Lilly Ledbetter Act." 686 F. Supp. 2d at 102 (quoting *Schuler v. PricewaterhouseCoopers, LLP*, 595 F.3d 370, 375 (D.C. Cir. 2010)).

- *Lipscomb v. Mabus*, 699 F. Supp. 2d 171 (D.D.C. Mar. 30, 2010). A plaintiff employee sued the Navy, claiming racial discrimination. The District Court granted the Navy's motion for summary judgment, but the U.S. Court of Appeals for the D.C. Circuit remanded *sua sponte* the employee's non-promotion claims for consideration under the Lilly Ledbetter Fair Pay Act. Judge Bates again followed *Schuler v. PriceWaterhouseCoopers, LLP*, 595 F.3d 370 (D.C. Cir. Feb. 16, 2010), holding that a non-promotion is not a discriminatory compensation decision under the Act.

Causation: Application of Gross to Two Unlawful Reasons

- *Cross v. Clough*, 2010 U.S. Dist. LEXIS 22415 (D.D.C. Mar. 11, 2010). A plaintiff prevailed against the Smithsonian Institution before the Merit Systems Protection Board on his claim that he was terminated for protected whistleblowing activities. The plaintiff then sued the Secretary of the Smithsonian for terminating his employment due to protected activity under Title VII. The Smithsonian filed a motion for summary judgment, arguing that "mixed motive" retaliation claims under Title VII are barred after *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). Judge Collyer denied the motion, noting that this was not a mixed motive case because the plaintiff claimed the Smithsonian had two unlawful reasons for his termination, and that each was separately actionable.

Causation: Application of Gross to Federal Sector ADEA

- *Ford v. Mabus*, 2010 U.S. App. LEXIS 25254 (D.C. Cir. Dec. 10, 2010). In an Age Discrimination in Employment Act (ADEA) action against a federal agency in which it was alleged that the agency discriminated on the basis of age in violation of section 633(a) of the ADEA, the court, Judge Tatel, writing for a unanimous panel, found that the language of section 633(a) was substantially different than the language upon which the

Supreme Court had relied in *Gross v. FBL Financial Services Inc.*, 129 S. Ct. 2343 (2009), and that accordingly courts may establish liability, although not necessarily entitlement to such remedies as reinstatement, by a showing that consideration of age was *a* factor in the challenged personnel action. Section 623 of ADEA prohibits personnel actions made "because of" a person's age; whereas section 633(a) provides that "all personnel actions… shall be free from *any* discrimination based on age."

Causation: Application of Gross to Title VII Mixed-Motive and Motivating Factor Retaliation Claims

- *Hayes v. Sebelius*, 2011 U.S. Dist. LEXIS 9839 (D.D.C. 2011) A plaintiff employee sued the Department of Health and Human Services for racial discrimination and retaliation under Title VII. In considering mixed-motive and motivating factor claims in light of *Gross v. FBL Financial Services Inc.*, 129 S. Ct. 2343 (2009), Judge Lamberth held as follows:

    - Title VII plaintiffs may not bring mixed-motives retaliation claims under *PriceWaterhouse*.

    - Title VII plaintiffs may not bring motivating factor retaliation claims under the 1991 revisions to Title VII.

    - Placing an employee on a Performance Improvement Plan could dissuade a reasonable employee from pursuing a discrimination claim, and thus may be an adverse action in a retaliation claim. 2011 U.S. Dist. LEXIS 9839 at 46 (*citing Kelly v. Mills*, 677 F. Supp. 2d 206, 225 (D.D.C. 2010)).

EEOC Administrative Procedures: Piggy-Backs Permitted

- *Brooks v. Dist. Hosp. Partners, L.P.*, 606 F.3d 800 (D.C. Cir. June 1, 2010). Appellant former nursing assistants' Title VII claims were dismissed by the District Court for failure to exhaust their administrative remedies. Judge Brown, writing for the majority, noted that non-filing parties may join the claims of a party that initially filed claims with the Equal Employment Opportunity Commission if their claims are so similar that requiring the parties to file independently would serve no purpose. The court found that an independent EEOC filing by appellants who had previously failed to file would be redundant, and that those appellants could remain in the lawsuit. The court also found that the suit could continue even though the original party filing before the EEOC had dismissed her claims with prejudice because she had filed her claims on behalf of herself and appellants who still had valid claims. Because the appellants had exhausted their administrative remedies, the court then reversed the dismissal and remanded.

Same Actor Defense

- *Kelly v. Mills*, 677 F. Supp. 2d 206 (D.D.C. Jan. 6, 2010). A plaintiff former employee sued the U.S. Small Business Administration for racial discrimination and retaliation in violation of Title VII. Judge Friedman held that where the same person who hired or promoted an employee later proposes that adverse action be taken against him, an inference of nondiscrimination arises, though it is not determinative. The plaintiff's evidence was not sufficient to overcome the inference of nondiscrimination, dooming his race discrimination claim. The defendant's unrebutted evidence that the plaintiff was terminated for unacceptable job performance, rather than retaliation, doomed the remainder of the plaintiff's claim, and the court entered judgment for the defendant.

Adverse Employment Action

- *Porter v. Shah*, 606 F.3d 809 (D.C. Cir. June 1, 2010). An African-American plaintiff employee appealed from the dismissal of his race discrimination, sex discrimination and retaliation claims under Title VII. Judge Henderson, writing for the U.S. Court of Appeals for the D.C. Circuit, upheld the dismissal of two of the plaintiff's claims because they were barred by res judicata, upheld the dismissal of four claims regarding non-promotions because the plaintiff failed to show pretext where he was not substantially more qualified than the selectee. The court reversed dismissal on two non-promotion claims where there was a substantial educational discrepancy between the plaintiff and the selectee, which could support a finding that the plaintiff was markedly more qualified than the selectee. Finally, the court reversed the dismissal of a retaliation claim, holding that a notification of unacceptable performance and related performance improvement plan, which had serious consequences affecting the plaintiff's employment, constituted a materially adverse action.

- *Sykes v. Napolitano*, 710 F.Supp.2d 133 (D.D.C. 2010). An African-American Secret Service agent brought suit, claiming that his reassignment was due to race. Judge Collyer granted the defendant Department of Homeland Security's motion for summary judgment, holding that the reassignment was not an adverse employment action under Title VII, and that only suspicion, not evidence, supported the plaintiff's argument that the reassignment was an adverse action based on race. It could not be said that the plaintiff's duties at his new position were any less critical to the Secret Service's mission, or that his responsibilities were significantly diminished.

- *Halcomb v. Office of Senate Sergeant-at-Arms*, 368 Fed. Appx. 150 (D.C. Cir. 2010). In a per curiam decision, the U.S. Court of Appeals for the D.C. Circuit upheld a judgment holding that a counseling memorandum and written warning for plaintiff's "refusal to

perform certain assigned tasks" did not "constitute an adverse employment action because they did not effect [sic] the plaintiff's employment."

Federal Sector: Timeliness of EEO Complaint

- *Miller v. Hersman*, 594 F.3d 8 (D.C. Cir. Feb. 5, 2010). A former employee of the National Transportation Safety Board appealed a decision from the District Court granting summary judgment to the NLRB on two counts of discriminatory non-promotion for failure to exhaust administrative remedies. The District Court found that the employee failed to consult an EEO counselor within 45 days of the alleged discriminatory actions. The U.S. Court of Appeals for the D.C. Circuit disagreed regarding count I, finding that the employee learned that a female had been selected for a particular position two months after the employee was not selected, which tolled the start of the 45 day period. The 45 day period was also tolled under count II because the employee contacted a NTSB EEO Director and Diversity Program Manager within the required time period, but that manager failed to contact an EEO counselor for several months.

EEOC Charges: Exhaustion

- *Akridge v. Gallaudet Univ.*, 2010 U.S. Dist. LEXIS 77854 (D.D.C. Aug. 3, 2010). The District Court, Judge Urbina, noting that Plaintiff did not specifically make a hostile work environment allegation before the EEOC in his charge, stated that exhaustion of administrative remedies is less stringent for hostile work environment claims than for discrete claims of discrimination for retaliation. Judge Urbina went on to state that a Plaintiff may adequately exhaust administrative remedies without explicitly alleging a hostile work environment claim in his formal EEO complaint so long as the hostile work environment claim is "like or reasonably related to the allegations… [in the formal EEO complaint] and grows out of such allegations." *Roberson v. Snow*, 404 F. Supp. 2d 79, 96 (D.C. 2005) (citing *Jones v. Billington*, 12 F.Supp. 2d 1, 7 (D.C. 1997)). Although the standard for exhaustion of a hostile work environment claim is less stringent, the court nonetheless found Plaintiff had failed to meet the lower threshold as Plaintiff's EEO charge was solely devoted to his allegation of discrimination based on his non-selection for a specific position.

ADA AA

Biagas v. Dist. of Columbia, 680 F. Supp. 2d 148 (D.D.C. Jan. 25, 2010). Judge Leon holds that the ADA AA is not retroactive. *See also DuBerry v. District of Columbia*, 582 F.Supp. 2d 27, 30 n.1 (D.D.C. 2008). Judge Leon further discusses whether the lifting restriction in this case substantially limits plaintiff if a major life activity, and finds that under the ADA AA it does not. Judge Leon relied on Judge Collyer's decision in *Lytes v.*

District of Columbia Water & Sewer Authority, 527 F.Supp. 2d 52, 56-61 (D.D.C. 2007) and Judge Urbina's decision in *Siragy v. Georgetown University*, 1999 U.S. Dist. LEXIS 21021 (D.D.C. Aug. 20, 1999).

- *Dave v. Lanier*, 681 F. Supp. 2d 68 (D.D.C. Feb. 3, 2010). Judge Urbina found that the ADA AA does not apply retroactively. *See also Lytes v. D.C. Water & Sewer Auth.*, 572 F.3d 936, 942 (D.C. Cir. 2009).

- *Miller v. Hersman*, 2011 U.S. Dist. LEXIS 23404 (D.D.C. 2011). A plaintiff former employee sued the NTSB alleging *inter alia*, discrimination on the basis of plaintiff's disability. Judge Kessler denied the defendant's motion for summary judgment as to the plaintiff's disability claim, holding that thinking and working are major life activities, but declining to rule on whether concentrating is a major life activity.

IV. Miscellaneous Statutory and Constitutional Claims

D.C. Whistleblower Protection Act

- *Williams v. District of Columbia*, 2010 D.C. App. LEXIS 727 (D.C. Dec. 9, 2010). Plaintiff claimed that he had been terminated from his position with the D.C. Department of Parks and Recreation (DPR) in violation of the D.C. Whistleblower Protection Act (D.C. WPA). The trial court dismissed Plaintiff's D.C. WPA claim, reasoning that the determining factor was whether Plaintiff's information already was in the public domain. Relying upon Plaintiff's acknowledgement that the information he conveyed already was known by members of the public, the lower court found the information to be in the public domain, and therefore the disclosure by Plaintiff of such information did not qualify as a "protected disclosure" under the D.C. WPA. The Court of Appeals, with Judge Thompson writing for a unanimous panel, declined "to adopt a reading of the D.C. WPA what would protect employees who have conveyed to their supervisors about the existence of an abuse of the type enumerated in the Act only in instances in which no one in the general public is aware of the abuse." The Court of Appeals went on to hold that, based upon the fact that Plaintiff's disclosure was not only public knowledge but that public concern had already been vocalized about the very information that Plaintiff disclosed, Plaintiff's disclosure in such circumstances did not qualify as a "protected disclosure".

    - In reversing the dismissal at the pleading stage, the Court of Appeals emphasized that a complaint should not be dismissed if there are alleged "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

- *Mentzer v. Lanier*, 677 F. Supp. 2d 242 (D.D.C. 2010). Two employees brought suit against the defendant chief of police, alleging they were retaliated against for engaging in protected activities under Title VII, the D.C. Whistleblower Protection Act, and the D.C. Human Rights Act. Judge Kollar-Kotelly granted the defendant's motion for summary judgment, and held that though the employees' complaints about their unit did constitute protected disclosures under the Whistleblower Protection Act, the employees failed to show that employer actions were motivated by retaliatory animus.

D.C. Whistleblower Protection Action: Retroactivity of Amendments

- *Cusick v. District of Columbia*, D.C. Super. Ct., No. 08-6915 (Aug. 17, 2010). Judge Braman held that the amendment which repealed section 12-309's application to D.C. Whistleblower Protection Act cases was retroactive.

D.C. Whistleblower Protection Act: Causation

Williams v. Johnson, 701 F. Supp. 2d 1 (D.D.C. Mar. 18, 2010). A plaintiff employee sued defendant employers and supervisors alleging violations of the D.C. Whistleblower Protection Act. The employee alleged that she was retaliated against for her testimony before the D.C. Council, and a separate meeting with a D.C. councilmember. Judge Kollar-Kotelly dismissed the employee's claims regarding her conversation with the councilmember, because the employee failed to offer evidence that the employer was aware of her conversation with the councilmember prior to initiation of the lawsuit, but denied summary judgment as to the retaliation claim based on the employee's statements before the D.C. Council.

FLSA Insurance Adjusters; Exercise of Discretion and Independent Judgment

- *Robinson-Smith v. Gov't Emples. Ins. Co.*, 590 F.3d 886 (D.C. Cir. Jan. 5, 2010). The Government Employees Insurance Corporation (GEICO) appealed a judgment from the District Court granting summary judgment to plaintiff employees seeking unpaid overtime under the Fair Labor Standards Act. In an opinion by Judge Henderson, the U.S. Court of Appeals for the D.C. Circuit reversed, finding that the employees were not due overtime under the "short test" in 29 C.F.R. § 541.2 because the employees' primary duties, including fact finding and negotiating total loss claims, required exercising discretion and independent judgment free from immediate supervision concerning matters of significance.

FLSA: Indemnity Action Against Employee Preempted and Independent Contractors and Counterclaim as Retaliation

- *Spellman v. Am. Eagle Express, Inc.*, 680 F. Supp. 2d 188 (D.D.C. Jan. 27, 2010). Plaintiff delivery drivers sued the defendant employer alleging violations of the Fair Labor Standards Act, and Maryland and D.C. wage payment laws. The employer counterclaimed and the drivers moved to dismiss, arguing that the counterclaim was preempted by the FLSA and was outside the scope of the indemnity clause. Judge Collyer denied the motion, noting that the court could not yet rule on the indemnity or preemption issues because the employer claimed the employees were independent contractors, thus potentially rendering the FLSA inapplicable.

FLSA: Collective and Class Action

- *Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3 (D.D.C. Mar. 8, 2010). Plaintiff employees moved for conditional certification of a class and certification of sub-classes in a lawsuit against the defendant employer for alleged violations of the Fair Labor Standards Act. Judge Roberts wrote that courts considering certification of a class under the FLSA engaged in a two step process. First, plaintiffs must make a modest factual finding sufficient to demonstrate that and potential plaintiffs were victims of a common policy or plan. Second, at the end of discovery defendants may move to decertify the conditional class if the record shows that the plaintiffs are not similarly situated. The court found that the plaintiffs had made the necessary modest factual showing, and that they satisfied the requirements of Rule 23 to certify the sub classes, and granted plaintiff's motion.

FLSA: Definition of Employer

- *Conrad v. Innovative Secs. Servs. LLC*, 2010 U.S. Dist. LEXIS 104989 (D.D.C. Sep. 30, 2010). Plaintiffs, current and former employees, sued the defendant employer and an individual who allegedly held himself out and acted as an officer and owner of the employer. The individual moved to dismiss, claiming that he was never an officer, owner or agent of the employer. Judge Kennedy applied a four-factor economic reality test, considering whether the alleged employer "(1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." 2010 U.S. Dist. LEXIS 104989 at *5 (*quoting Henthorn v. Dep't of Navy*, 29 F.3d 682, 684 (D.C. Cir. 1994)). The court found that the employees presented evidence that the individual managed the company's payroll, signed paychecks, assigned and disciplined employees, formed contract with clients, and alleged that he and his brother had a 50% ownership share in the company. Satisfied that the plaintiffs had met their burden under the economic reality test, the court denied the motion.

False Claims Act

- *United States ex rel. Schweizer v. Oce N.V.*, 681 F. Supp. 2d 64 (D.D.C. Jan. 29, 2010). A plaintiff relator filed a qui tam action against defendant corporation, alleging violations of the False Claims Act. When the United States reached a settlement agreement with the defendant and moved to dismiss, the relator objected. Judge Lamberth granted the dismissal, finding that the United States may settle a qui tam case notwithstanding the objections of a relator if the court determines that the settlement is fair, adequate, and reasonable under the circumstances.

False Claims Act: Statute of Limitations in §3730(h) Retaliation Actions

- *Saunders v. District of Columbia*, 711 F. Supp. 2d 42 (D.D.C. May 13, 2010). The District Court, Judge Kollar-Kotelly, was called upon to decide which D.C. statute of limitations governed a retaliation claim under section 3730(h) of the False Claims Act. In the wake of *Graham County Soil & Water Conservation District v. United States ex rel Wilson*, 545 U.S. 409 (2005), the District Court had to determine which D.C. statute of limitations was most closely analogous to a FCA retaliation claim. Recognizing that this issue is one of first impression in the D.C. Circuit, the court reviewed authorities from outside this jurisdiction and then reviewed the various alternative statutes that might apply. Plaintiff argued that the court should apply the catchall three-year statute of limitations, whereas the District argued that the D.C. Whistleblower Protection Act is the most closely analogous state statute and the court should accordingly apply its limitation period, which the District asserted to be one year. The court noted that during the pendency of the litigation, the D.C. Council had amended the D.C. WPA to expand the statute of limitations to three years with the amendment becoming effective on March 11, 2010. In addition, the court's own research suggested a third possibility – the District's statute of limitations period for claims of wrongful discharge in violation of public policy, which appeared to be three years. Finding that the parties' briefing on this issue had been inadequate, the court declined to make a ruling and directed the parties to file supplemental briefs. On September 27, 2010, the District filed a motion to dismiss Plaintiff's claims as time-barred. Plaintiff filed a memorandum in opposition on October 12, 2010; and the District filed its reply on December 10, 2010. Judge Kollar-Kotelly has not ruled on this motion as of April 5, 2011.

False Claims Act: FERA Retroactivity

- *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 709 F. Supp. 2d 52 (D.D.C. May 4, 2010). In a False Claims Act case, the District Court denied a motion to dismiss by the defendants, including several companies and individuals. Two companies filed a motion for reconsideration regarding a FCA false statement claim, arguing that the Fraud Enforcement and Recover Act's amendments to 31 U.S.C.S. § 3729(a)(2) did not

apply retroactively. Judge Roberts disagreed, holding that the FERA's amendments did not apply retroactively to the claims at issue, and denied the motion.

False Claims Act: Pleading Requirements

- *United States ex rel. Bender v. N. Am. Telecomm., Inc.*, 2010 U.S. Dist. LEXIS 117420 (D.D.C. Nov. 4, 2010). A plaintiff relator brought a qui tam suit under the False Claims Act on behalf of the United States. The defendants moved to dismiss the claims, and Judge Kessler granted the motion, finding that the plaintiff had failed to "make specific allegations against each individual defendant rather than collective allegations against 'each of the above-named Defendants,' since one of the main rationales behind Rule 9(b)'s particularity requirement is to 'guarantee all defendants sufficient information to allow for preparation of a response.'" 2010 U.S. Dist. LEXIS 117420 at *10 (*quoting U.S. ex rel. Bender v. N. Am. Telecomms., Inc.*, 686 F. Supp. 2d 46, 50 (D.D.C. 2010)).

False Claims Act: Collective Knowledge Jury Instruction

- *United States v. Sci. Applications Int'l Corp.*, 2010 U.S. App. LEXIS 24808 (D.C. Cir. Dec. 3, 2010). A government contractor appealed from a jury verdict in District Court finding that the contractor violated the False Claims Act by seeking payments from the United States when it knew it was violating conflict of interest provisions in its contract. Judge Tatel found that the District Court erred in giving the jury an instruction based on "collective knowledge" that was prejudicial and erroneous because it could have misled the jury into believing that the standard for knowledge under the FCA was different for individuals and corporations.

- Posting of Robert M. P. Hurwitz to Government Contracts Blog, http://www.governmentcontractslawblog.com/2011/01/articles/false-claims/dc-circuit-rejects-collective-knowledge-but-shines-spotlight-on-processes/ (Jan. 18, 2011, 12:52 EST).

Section 1983: First Amendment: Petition Clause: Unpaid Volunteer

- *LeFande v. D.C.*, 613 F.3d 1155 (D.C. Cir. July 23, 2010). A volunteer member of the D.C. Metropolitan Police Department Reserve Corps brought a class action suit against the chief of police challenging new rules regarding termination of Reserve Corps members without cause or process. The chief fired the volunteer, and the volunteer brought a First Amendment retaliation suit under 42 U.S.C. § 1983. The District Court dismissed the complaint, but the U.S. Court of Appeals for the D.C. Circuit reversed. In an opinion by Judge Henderson, the court found that the volunteer's speech related to a matter of public concern because it impacted a matter of political, social, or other concern to the community, it was more than a personal grievance, and it involved information that

was necessary to enable members of the public to make informed decisions about the operation of the government.

FMLA

- *McFadden v. Ballard Spahr Andrews & Ingersoll, LLP*, 611 F.3d 1 (D.C. Cir. June 29, 2010). Plaintiff, a non-lawyer employee of the Defendant law firm, alleged claims under the federal Family and Medical Leave Act (FMLA) against the firm and the firm's human resources director. Plaintiff claims that Defendant interfered with her rights under the FMLA by misinforming her about the amount of leave to which she was entitled and by pressuring her not to take leave. The trial court granted summary judgment to the Defendant, and assumed *arguendo* that the law firm violated the FMLA, but held that no reasonable jury could find that Plaintiff was prejudiced by the alleged violation. In particular, Plaintiff had never been denied leave when she requested it, Plaintiff had failed to produce sufficient evidence in support of her claim that she paid her sister to care for her ailing husband, and, in any event, Plaintiff did not allege a causal relationship between the firm's conduct and the payments. The Court of Appeals found that none of the trial court's rationales could support its decision, holding that Plaintiff can succeed in an FMLA action without showing that the employer denied her leave request. The Court of Appeals emphasized that Plaintiff need only show that the employer "interfere[d] with… the exercise of" Plaintiff's FMLA right and that she suffered monetary losses as a direct result of the violation, such as the cost of providing care. The Court of Appeals went on to find that a reasonable jury could find that Plaintiff paid her sister to care for her husband based upon Plaintiff's uncontroverted declaration to that effect. Finally, the Court of Appeals declined to decide whether the human resources director could be held personally liable in an FMLA case.

- *Breeden v. Novartis Pharms. Corp.*, 684 F. Supp. 2d 58 (D.D.C. Feb. 16, 2010). Judge Robertson held as follows:

    - "In the particular facts of this case, restoring a sales representative to a realigned sales territory that had been diminished in size and quality is not a violation of the FMLA."

    - "No FMLA violation occurs when an employee previously required to travel regularly is given an office job upon restoration."

    - "Shifting the focus in a sales position from maintenance of old accounts to the creation of new accounts is not sufficient to establish an FMLA violation."

    - "Diminution in the 'prestige' of one's job is not a violation as the regulations specifically exclude any intangible or immeasurable aspects of the job."

- *Breeden v. Novartis Pharms. Corp.*, 714 F. Supp. 2d 33 (D.D.C. May 26, 2010). After a jury found in favor of a plaintiff former employee in a FMLA case, the defendant employer moved for judgment as a matter of law notwithstanding the verdict. Judge Robertson granted the motion because there was a three year gap between the former employee's FMLA leave and her termination, and because the former employee failed to prove that she suffered any harm as a result of her leave.

D.C. Minimum Wage Revision Act and Wage Payment and Collection Law

- *Morales v. Landis Constr. Corp.*, 715 F. Supp. 2d 86 (D.D.C. June 4, 2010). A plaintiff former employee sued the defendants, including a former employer, alleging that he had been deprived of overtime pay in violation of the Fair Labor Standards Act and the D.C. Minimum Wage Revision Act. The employer admitted that it had failed to pay time and a half to the employee for 25 hours of overtime, but the employee alleged he was owed time and a half for 150.5 hours. Judge Friedman denied the employee's motion for summary judgment because genuine issues of material fact remained as to how many overtime hours the employee worked.

D.C. Wage Payment and Collection Law: Personal Liability

- *Ventura v. Bebo Foods, Inc.*, 2010 U.S. Dist. LEXIS 75395 (D.D.C. July 27, 2010). The District Court, Judge Lamberth, found that the individual Defendant may be personally liable for minimum wage and overtime violations of the Fair Labor Standards Act (FLSA) and the D.C. Wage Payment and Collection Law. The court found the individual Defendant, who was majority or sole owner of the corporate defendants, to be an employer within the meaning of the two statutes because the definition of "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. 203(b). Judge Lamberth stated that corporate office qualified as an employer along with a corporation under the FLSA if the officer has operational control of a corporation's covered enterprise. Relying upon a 6th Circuit case (*Dept. of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775, 778 (6th Cir. 1995)), the District Court found that an individual has operational control if he/she is a high-level executive, has a significant ownership interest, controls significant functions of the business, and determines salaries and makes hiring decisions.

Congressional Accountability Act: Timeliness of Request for Counseling

- *Gordon v. Office of the Architect of the Capitol*, 2010 U.S. Dist. LEXIS 120159 (D.D.C. Nov. 12, 2010). A plaintiff employee sued the Office of the Architect of the Capitol alleging discriminatory and retaliatory practices in violation of the Congressional Accountability Act. The defendant moved to dismiss, alleging that the employee failed to exhaust her administrative remedies under the CAA because her request for counseling

was not made within 180 days of the alleged violation. Judge Walton granted the motion in part, finding that the plaintiff had failed to assert her hostile work environment claim in a previous request for counseling.

ERISA

- *Overby v. Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290 (D.C. Cir. Feb. 26, 2010). A plaintiff annuity recipient and his wife sued the defendant trust plan seeking a declaration that an amendment to the trust plan that would have rendered the wife ineligible for benefits after the plaintiff's death was not properly adopted. The District Court granted the declaration, and in an opinion by Judge Sentelle the U.S. Circuit Court for the D.C. Circuit affirmed, holding that the amendment was not properly adopted under the Employee Retirement Income Security Act because the defendants had failed to follow the plan's own amendment procedures.

Unemployment Compensation

- *Benjamin v. Wash. Hosp. Ctr.*, 2010 D.C. App. LEXIS 600 (D.C. Oct. 21, 2010). A petitioner sought review of a ruling from the Department of Employment Services and the Office of Administrative Hearings that she was disqualified from receiving benefits because she had been terminated for misconduct. Judge Terry remanded the matter, finding that the DOES and OAH examiners failed to make explicit findings that the petitioner was terminated for gross misconduct, which requires a finding that the misconduct was willful or deliberate.

- *Bynum v. Arch Training Center*, 998 A.2d 316 (D.C. 2010). The petitioner customer service and hospitality instructor sought review of a ruling by an administrative law judge that she was not eligible to receive unemployment benefits because she quit her position without good cause connected with the work. When only one person signed up for a class she taught the employer's executive director met with her and stated that the class "just didn't really work with one person." The petitioner then said she would be leaving to pursue another employment opportunity. Judge Ruiz remanded the matter, finding that the ALJ had failed to consider the petitioner's testimony that she had quit because she was uncertain as to her future with the employer, which could satisfy the reasonable person test for good cause in D.C. unemployment compensation regulations.

- *Brown v. Hawk One Security, Inc.*, 3 A.3d 1142 (D.C. 2010). The court, with Judge Blackburn-Rigsby writing for the unanimous panel, affirmed Plaintiff's challenge to the final order of the D.C. Office of Administrative Hearings, which had affirmed a determination of the D.C. Department of Employment Services to deny Plaintiff's claim for unemployment benefits. The OAH had affirmed the decision of the DOES claims examiner, finding that Plaintiff's conduct constituted "gross misconduct" on two bases.

First, OAH found that Plaintiff's actions "deliberately or willfully threatened or violated the employer's interest in maintaining the peace and setting a good example for the students." Second, OAH concluded that Plaintiff also showed a disregard for standards of behavior which the employer had a right to expect of its employee. Plaintiff argued that her conduct did not constitute "gross misconduct" but rather "simple misconduct" citing prior precedents from the Court of Appeals, *Obeniran v. Hanley Wood, LLC*, 985 A.2d 421 (D.C. 2009), and *Doyle v. NIA Personnel, Inc.*, 991 A.2d 1181 (D.C. 2010).

- In both of those cases, the Court of Appeals had held as a matter of law that the conduct at issue did not rise to the level of "gross misconduct." In the instant case, the court found "gross misconduct" as Plaintiff was terminated because she "deliberately provoked a physical confrontation with another uniformed on-duty security guard in a school hallway."

- *In Doyle, the Court of Appeals,* Judge Farrell writing for the unanimous panel, reversed the finding of gross misconduct where the employee "deliberately and willfully" failed to follow one of her employer's rules. The employer in *Doyle* was a staffing agency and it had a rule requiring all of its employees to notify it as soon as their temporary placement ended. The ALJ in that case found that Doyle was terminated for "gross misconduct" because she knew about the rule and she deliberately failed to follow it. The Court of Appeals reversed, reasoning that Doyle's conduct – her "intentional failure" to notify her employer about her availability for reassignment – was even less egregious than "the deliberate refusal to do work despite reproof found insufficient in *Obeniran*."

- *Bowman-Cook v. Washington Metropolitan Area Transit Authority*, 2011 D.C. App. LEXIS 111 (D.C. 2011). A plaintiff employee appealed from an OAH ruling that she could not receive immediate unemployment compensation because she was terminated for conduct that constituted simple misconduct under D.C. Mun. Regs. Tit. 7, § 312.5. In an opinion by Judge Thompson, the D.C. Court of Appeals reversed, finding that the ALJ failed to find that the plaintiff had notice of a certified letter to her, precluding a finding that her refusal to accept was intentional, and that the ALJ failed to allow the plaintiff to present evidence of her alleged communication with the employer during a medical leave of absence.

COBRA: as Amended by the American Recovery and Reinvestment Act of 2009

- *Dorsey v. Holman*, 707 F. Supp. 2d 21 (D.D.C. Apr. 27, 2010). A plaintiff former employee sued her former employer, a profit sharing plan, and a plan administrator for failure to provide health insurance premium assistance as required by the American Recovery and Reinvestment Act. Judge Collyer granted the defendants' motion to dismiss, holding that the employee had failed to exhaust her administrative remedies, and

that it was consistent with the policies of the ARRA to require a plaintiff who was denied COBRA benefits to utilize the administrative appeal process prior to filing suit.

COBRA: as Amended by the American Recovery and Reinvestment Act of 2009; Same Claims and Sanctions

- *Dorsey v. Jacobson Holman, PLLC*, 2010 U.S. Dist. LEXIS 141498 (D.D.C. 2011). The plaintiff former employee sued the defendant law firm alleging failure to make contributions to the firm profit-sharing plan on her behalf, failure to provide notice of continuing health coverage as required by the American Recovery and Reinvestment Act and the Consolidated Omnibus Budget Reconciliation Act, and interference with plaintiff's ERISA rights. Judge Collyer granted the defendant's motion to dismiss because the plaintiff either already had or could have brought the same claims in her previous suit against defendants, which was still pending, but declined to impose sanctions on the plaintiff.

First Amendment Claims: Civil Service Reform Act

- *Ramirez v. U.S. Customs & Border Prot.*, 709 F. Supp. 2d 74 (D.D.C. May 5, 2010). A plaintiff employee of the U.S. Customs and Border Protection sued, alleging violations of his First Amendment rights and violations of the Administrative Procedure Act. Judge Kessler denied the defendant's motion to dismiss as to the plaintiff's First Amendment claim because the employee was not required to exhaust administrative remedies as to that claim, but granted the defendant's motion as to plaintiff's APA claim, finding that it was precluded by the Civil Service Reform Act.

Privacy Act

- *Tolbert-Smith v. Chu*, 714 F. Supp. 2d 37 (D.D.C. May 26, 2010). The District Court, Judge Roberts, denied the defense motion for partial judgment on the pleadings in this Privacy Act, 5 U.S.C. 552(a), claim. Here, Plaintiff alleged that a member of management placed information referring and relating to her disability on a server accessible by other federal employees and members of the public. The court found that the information on the server constituted a record under the statute because it contained information about Plaintiff's medical and employment circumstances.

- *York v. McHugh*, 698 F. Supp. 2d 101 (D.D.C. Mar. 22, 2010). A plaintiff employee brought suit against the defendant employer for violations of the privacy act where the plaintiff's medical records were allegedly placed on a shared network drive accessible to all employees. The defendant moved to dismiss, claiming that the plaintiff failed to allege related injuries or actual disclosure. Judge Kollar-Kotelly denied the motion, finding that the plaintiff's allegation that managers revealed the contents of medical records to the

defendant's employees was a sufficient allegation to survive a motion to dismiss, and that the plaintiff had sufficiently pled resulting injuries.

- *Elham Sataki v. Broad. Bd. of Governors*, 2010 U.S. Dist. LEXIS 112707 (D.D.C. Oct. 22, 2010). The plaintiff sued her employer, the Broadcasting Board of Governors (BBG), alleging that she was sexually harassed and assaulted by a co-worker. After the plaintiff voluntarily dismissed several of her claims, Judge Kollar-Kotelly considered the plaintiff's Privacy Act claims. BBG argued that the plaintiff's Privacy Act claims were barred because she failed to exhaust her administrative remedies because she brought suit prior to a final determination and prior to filing an administrative appeal. The court granted BBG's motion because the plaintiff failed to respond at all.

- *Cloonan v. Holder*, 2011 U.S. Dist. LEXIS 22993 (D.D. C. 2011). A Department of Justice employee sued her former supervisor, the U.S. Marshals Service (USMS), and other individuals for violation of the Privacy Act when her former supervisor allegedly provided information from her records to his attorney, who then sent a letter to several federal officials repeating the information. Judge Lamberth granted summary judgment as to the individual defendants, including the former supervisor, because individuals are not proper parties under the Privacy Act, and substituted DOJ for the USMS. Judge Lamberth denied summary judgment as to the Department, holding that the *Bartel* exception to the retrieval rule was inapplicable, and that the plaintiff produced evidence that the letter from the attorney may have been based on the plaintiff's improperly viewed records, rather than other materials.

- *Armstrong v. Geithner*, 608 F.3d 854 (D.C. Cir. 2010). A plaintiff former employee sued the Secretary of the Treasury and a supervisor alleging violations of the Privacy Act. A coworker had filed a complaint alleging that the plaintiff had accessed a database without authorization and had disclosed confidential information. The plaintiff then was selected for a position at a different agency, but the coworker sent anonymous letters to the hiring agency detailing the investigation into the plaintiff's alleged unauthorized access. At trial, the District Court entered judgment for the defendants, and the plaintiff appealed. In an opinion by Judge Ginsburg, the Court held as follows:

    - All of the information in the letters could be traced back to the coworker's complaint, her observations, and the rumor-mill.

    - The plaintiff's mere assertion that the disclosure came from a record was not compelling.

    - The plaintiff failed to establish that the information in the letters was retrieved from a record held in a system of records, as required by the Privacy Act.

Worker's Compensation

- *Lincoln Hockey, LLC d/b/a Washington Capitals v. District of Columbia Department of Employment Services*, 997 A.2d 713 (D.C. 2010). While playing for the Capitals' minor league affiliate based in Maine, the player suffered a career-ending head injury. The Capitals argued that DOES erred in finding that the player's workers' compensation claim came within the jurisdiction of the District of Columbia Workers' Compensation Act. The Court of Appeals found that there was jurisdiction because the Capitals had signed him to contribute to the achievement of their business objective of winning games in the District, and that that fact showed that he performed the principal services for which he was hired in the District. Moreover, the Court of Appeals relied upon the fact that the team, not its minor league affiliate, controlled all aspects of the player's employment, and found that that demonstrated that his employment relationship had more substantial contacts in the District than in any other place. Finally, the Court of Appeals rejected the team's argument that DOES was required to limit the player's award according to his work-life expectancy as a professional athlete.

- *Ramey v. District of Columbia Department of Employment Services*, 997 A.2d 694 (D.C. 2010). A claimant sought benefits under the D.C. Workers' Compensation Act. The Department of Employment Services denied the claim, and the Compensation Review Board affirmed the denial. Judge Nebeker also affirmed the denial, finding that the employer had rebutted the presumption of compensability by demonstrating that the claimant's alleged psychological problems, including post dramatic stress disorder, were likely related to his drug and alcohol addiction, rather than any actions of the employer.

Comprehensive Merit Personnel Act

- *Lewis v. D.C. Department of Motor Vehicles*, 987 A.2d 1134 (D.C. 2010). Plaintiff was a hearing examiner for the DMV who was terminated after he consistently dismissed tickets generated by the Automated Traffic Enforcement system. OEA sustained the termination, and Employee/Plaintiff filed suit in the Superior Court. The Superior Court bifurcated the case, and affirmed the OEA decision. The employee appealed from the affirmance of the OEA decision, and the Court of Appeals dismissed the appeal. Plaintiff then filed a second amended complaint in which he alleged that he had been "wrongfully terminated." The Court of Appeals found that, having abandoned judicial review of the OEA decision, the employee was precluded from filing a separate action challenging his termination. Under the Comprehensive Merit Personnel Act, common law wrongful termination claims were preempted and the sole recourse to challenge a termination was an appeal to the OEA. In passing, the Court did state: "We have no doubt that a termination that violates public policy cannot constitute a cause." Further, the Court of Appeals stated:

"The only exception [to preemption] we have recognized is for claims arising under the District of Columbia Human Rights Act… No such claim is presented here. Appellant argued in the trial court that the release he requested under section 1983 alleging that he was terminated in violation of due process was not available under the CMPA, and therefore was not precluded by the trial court's affirmance of the OEA decision. Appellant has not presented this argument on appeal, and we do not address it. *See White*, 852 A.2d at 927 (noting that '[a]n exclusive remedy does not lose its exclusivity upon a showing that an alternative remedy might be more generous.')."

Fair Treatment for Experienced Pilots Act

- *Jones v. Air Line Pilots Ass'n, Int'l*, 713 F. Supp. 2d 29 (D.D.C. May 25, 2010). A plaintiff airline pilot challenged the constitutionality of the Fair Treatment for Experienced Pilots Act's restrictions on pilots who turned 60 before the Act passed. The U.S., the Airline Pilots Association International, and the defendant airline moved to dismiss. Judge Bates found as follows:
    - Congress had to balance safety with other rational legislative goals. Preserving a calm labor market was one such rational goal.
    - Congress could rationally have decided that allowing all retired commercial pilots between sixty and sixty four to return to their pre-retirement positions would disrupt the airline pilots' labor hierarchy.
    - The pilot did not show that the FTEPA's protection for compliance provision did not bear a rational relation to a legitimate government purpose.

V. Common Law Claims

Defamation

- *Williams v. District of Columbia*, 9 A.3d 484 (D.C. Dec. 9, 2010). Plaintiff alleged a claim of defamation, asserting, on information and belief, that a senior official of the District of Columbia Government had initiated the publication of a false rumor that Plaintiff had been terminated for embezzlement. The trial court had dismissed the defamation claim on the grounds that the Plaintiff had failed "to identify who allegedly made the statement, when it allegedly was made, and to whom it allegedly was made." The Court of Appeals reversed, holding that Plaintiff's claim should not have been dismissed at that stage because Plaintiff had, as in *Crowley v. North American Telecomm. Ass'n* ,691 A.2d 1169 (D.C. 1997), identified by employment the person to whom the statement was allegedly made; alleged the substance of the alleged defamatory statement;

and attributed the defamatory statement to a senior District official and alleged that the defamation occurred within a discrete timeframe of approximately two weeks, noting that the court had found sufficient in *Oparaugo v. Watts*, 884 A.2d 63, 77 (D.C. 2005), where the allegations narrowed the time of publication of the defamatory statement to a 22-month window. The court went on to state that the subset of senior District officials who would have been displeased with Plaintiff's allegations and testimony was not so large that Plaintiff's claim should be foreclosed before any discovery had been conducted. In reversing the dismissal at the pleading stage, the Court of Appeals emphasized that a complaint should not be dismissed if there are alleged "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

- *Parnigoni v. St. Columba's Nursery Sch.*, 681 F. Supp. 2d 1 (D.D.C. Jan. 29, 2010). A former teacher, her husband, and her son sued the former teacher's employer school, among other defendants, for defamation and other claims. The husband had previously been convicted of indecently exposing himself to a minor. Judge Walton found that the allegedly defamatory statement in a letter, though true, could be found to create a defamatory inference as to the former teacher, because it implied that she posed a danger to children as a result of her decision to marry the husband.

Intentional Infliction of Emotional Distress

- *Williams v. District of Columbia*, 9 A.3d 484 (D.C. Dec. 9, 2010). On the IIED claim, the court affirmed the dismissal, restating that it has been exacting as to the proof required to sustain such a claim in the employment context because generally, employer-employee conflicts do not rise to the level of outrageous conduct. In reversing the dismissal of the IIED claim at the pleading stage, the Court of Appeals emphasized that a complaint ought not be dismissed if there are alleged "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

Contract

- *Plesha v. Ferguson*, 725 F. Supp. 2d 106 (D.D.C. July 27, 2010). A plaintiff lobbyist sued client defendants alleging breach of contract, promissory estoppel, quantum meruit and fraud. On defendants' motion to dismiss, Judge Kollar-Kotelly held that the plaintiff's claims for promissory estoppel and quantum meruit involved promises made in the written contract, and thus were valid, but dismissed the fraud claim because it arose out of the same conduct by the clients that was the basis for the breach of contract claim.

Contract: Compensation Policy

- *America's Choice, Inc. v. Bienvenu*, 700 F. Supp. 2d 1 (D.D.C. Mar. 26, 2010). A former employer filed a declaratory judgment action against a former employee seeking a declaration that the employer did not owe the employee a commission on a sales contract. The employee countersued for the commission, and both sides moved for summary judgment. Judge Sullivan, reviewing the agreement under Arkansas law, found that a contract existed, and found that genuine issues of material fact existed regarding:
    - 1) the exact terms of the compensation policy and whether they were ever modified;
    - 2) what the employee was told the policy was, and when she was told;
    - 3) if there was a general policy to apply commission credit after services were invoiced, what the exceptions to that policy were, who decided whether the exceptions would apply, and whether the contract fell into an exception; and
    - 4) what the employer meant by contractual certainty.

Contract: Statute of Frauds

- *Nattah v. Bush*, 2011 U.S. Dist. LEXIS 28118 (D.D.C. 2011). The plaintiff alleged that the defendant, L-3 Services, breached his oral employment contract as an interpreter in Kuwait and sold him as a slave to the U.S. Army, and that various U.S. entities unlawfully detained him and forced him to work as an interpreter and soldier in Iraq without compensation. Judge Lamberth, applying Virginia law, granted L-3's motion to dismiss the breach of contract claim because it was barred by the statute of frauds where "the alleged for-cause nature of the employment relationship rendered the period of employment potentially indefinite."

Negligent Supervision and Retention

- *Simms v. District of Columbia*, 699 F. Supp. 2d 217 (D.D.C. Mar. 30, 2010). Judge Lamberth dismissed the plaintiff's negligent supervision claim on two grounds. First, the actor was not employed by the defendant. Second, "a common law claim for negligent supervision may be predicated only on common law causes of action or duties other imposed by the common law," *Fred A. Smith Management Co. v. Cerpe*, 957 A.2d 907, 916 (D.C. 2008), and the plaintiff had failed to allege violations of other duties imposed by the common law.

- *Pietsch v. McKissack & McKissack*, 677 F. Supp. 2d 325 (D.D.C. Jan. 12, 2010). A plaintiff employee sued a defendant employer for negligent supervision. The employee

had been romantically involved with a coworker. After they broke up, the coworker publicly humiliated the employee with rude and humiliating comments, stalked her at her residence, and verbally assaulted her. When the employee complained to an executive vice president, she was told she would have to get along with the coworker. Judge Urbina considered the employee's motion to amend the complaint to include a claim for intentional infliction of emotional distress, and a motion to dismiss by the defendant. He held that given the employer's failure to respond to repeated complaints by the employee, the employee had articulated a claim for negligent supervision. Judge Urbina then denied the motion to dismiss and allowed the amendment.

Hostile Work Environment as Inadequate Proof of Constructive Discharge

- *Brown v. District of Columbia,* 2011 U.S. Dist. LEXIS 21078 (D.D.C. 2011). After a verdict in plaintiff's favor on a hostile work environment sexual harassment claim, the plaintiff requested equitable relief in the form of back pay or front pay, even though the plaintiff failed to plead or present a claim of constructive discharge. Judge Kay denied the plaintiff's request, and held as follows:
    - A successful hostile work environment claim does not substitute for an unproven claim for constructive discharge because proving constructive discharge requires a greater severity of pervasiveness of harassment than the minimum required to prove a hostile work environment.
    - A plaintiff who is not terminated by her employer must prove that she was constructively discharged in order to support an award of post-resignation front pay or back pay.
    - Evidence presented at trial may suffice to support a finding of constructive discharge made by the court at the equitable relief phase of trial, even absent a finding on the issue.

VI. Attorneys' Fees, Expert Witness Fees, and Costs

Attorneys' Fees

- *Fitts v. Unum Life Ins. Co. of Am.*, 680 F. Supp. 2d 38 (D.D.C. Jan. 13, 2010). Judge Kennedy finds unpersuasive, in the defense argument to reduce Plaintiff's fee award, the fact that the Defendant's lawyers billed $400,000 less for its defense than Plaintiff's time records reflect. The court stated that it was "not persuaded that this disparity is evidence that Fitts's fees are unreasonable. First, Unum has provided no authority to support its contention that the fees and costs it incurred are relevant to an analysis of Fitts's reasonable fees. Second, Unum regularly engages in litigation under ERISA while Fitts

never before has done so is significant. It is not surprising there is a difference between attorneys' fees and costs incurred by these opposing parties." Relying on *Role Models American, Inc. v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004), Unum argued that Plaintiff's fees should be reduced on account of so-called "block billing," that is, lumping various tasks together in single entries such that it is impossible to evaluate the reasonableness of those entries. Judge Kennedy declined to follow *Role Models* in this particular factual circumstance, finding that a relatively small fraction of the time entries reflect "block billing" whereas in *Role Models* the problem was pervasive.

- *D.C. v. Straus*, 590 F.3d 898 (D.C. Cir. Jan. 8, 2010). A lawyer initiated administrative proceedings against the District of Columbia on behalf of a special needs student. When the claims were dismissed, the D.C. government sought attorney's fees under a fee-shifting provision in the Individuals with Disabilities Education Act, arguing that the lawyer continued the litigation after the complaint was groundless. The District Court granted summary judgment to the lawyer, and the D.C. government appealed. In an opinion by Judge Tatel, the U.S. Court of Appeals for the D.C. Circuit held that the D.C. government could not seek attorney's fees because it was not a prevailing party under the circumstances, and thus it could not recover fees even if the lawyer litigated inappropriately.

Expert Witness Fees

- *Schmidt v. Solis*, 2010 U.S. Dist. LEXIS 120986 (D.D.C. Nov. 16, 2010). When a discovery dispute erupted between the parties, the plaintiff moved for an award of fees for expert witness deposition preparation. Judge Facciola reversed a position he articulated in *U.S. ex rel. Fago v. M&T Mortg. Corp*., 238 F.R.D 3 (D.D.C. 2006), and held that reasonable fees for the time spent by an expert preparing for a deposition should always be paid by the party taking the deposition.

- *Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 2010 U.S. Dist. LEXIS 82543 (D.D.C. Aug. 5, 2010). Judge Lamberth followed *U.S. ex rel. Fago v. M&T Mortg. Corp*., 238 F.R.D 3 (D.D.C. 2006), and held that preparation time for a deposition was not included in the scope of Rule 26(b)(4)(C), and stated that fees for such time would be awarded on a case-by-case basis.

Costs and Expenses

- *Youssef v. Federal Bureau of Investigation*, 2011 U.S. Dist. LEXIS 9832 (D.D.C. 2011). An employee of the FBI brought suit for racial discrimination and retaliation. The court granted in part and denied in part the defendant's motion for summary judgment, and tried the plaintiff's remaining retaliation claim before a jury. After the court entered judgment for the defendants, the plaintiff filed a motion for new trial and to alter or

amend judgment. The plaintiff also filed a motion to review costs and an alternative motion to stay adjudication of costs. Judge Kollar-Kotelly denied the plaintiff's motion for a new trial, finding that there was substantial evidence at trial that the plaintiff was not harmed by the FBI's denial of plaintiff's request to attend a certification session because the sessions were held frequently and certification could be obtained through alternate means. Plaintiff's motion to review costs was granted in part because defendants failed to show that a deposition was necessarily obtained for use in the case, because the defendants failed to show why it was necessary for a witness to remain in Washington, DC for two days, incurring subsistence expenses, and because airfare claimed for a witness was excessive.

VII. Arbitration

Arbitration

- *A1 Team United States Holdings, LLC v. Bingham McCutchen LLP*, 998 A.2d 320 (D.C. July 1, 2010). The client of a law firm filed an arbitration claim against the firm seeking return of fees the client had paid. The arbitrator found for the firm, and the firm filed a motion for confirmation with the Superior Court of the District of Columbia. The Superior Court granted the motion, and entered judgment for the firm for $48,869.31. The client appealed, arguing that the D.C. Arbitration Act, D.C. Code § 16-4423(b), authorized de novo review of an award on any reasonable basis. In an opinion by Judge Reid, the U.S. Court of Appeals for the D.C. Circuit upheld the award, finding that the D.C. Arbitration Act carried a narrow and extremely limited standard of review that did not allow for de novo review on any reasonable basis.

Arbitration: Petition to Vacate Arbitration Award

- *Thian Lok Tio v. Wash. Hosp. Ctr.*, 2010 U.S. Dist. LEXIS 125747 (D.D.C. Nov. 30, 2010). A petitioner doctor and former employee of Washington Hospital Center (WHC) sought vacation of an unfavorable arbitration award. The petitioner sought arbitration when his employment contract, which contained an arbitration clause, was terminated. The arbitrator found that the petitioner's discrimination claim failed because the petitioner failed to establish that he had been treated disparately from other WHC physicians, and that the petitioner had been terminated for cause. Finding that the petitioner failed to support his claims of evident partiality, misconduct, and manifest disregard of the law on the part of the arbitrator, Judge Urbina upheld the arbitral award.

Arbitration: Manifest Disregard of the Law

- *Owen-Williams v. BB&T Inv. Servs.*, 717 F. Supp. 2d 1 (D.D.C. May 24, 2010). An employee sued his employer for breach of contract, and the District Court for the District

of Columbia granted the employer's motion to compel arbitration. The arbitration panel issued an award to the employer, and the employee moved to vacate, or in the alternative, to reconsider the award. Judge Kollar-Kotelly upheld the award, and found as follows:

- The award was not procured by fraud.
- A continuance granted by the panel was not merely a means for the employer to obtain more time.
- The alleged fraud and delay were not material to the award.
- The panel's failure to explain the basis for the award did not justify vacatur.
- The record did not demonstrate that the panel ignored evidence or was biased.

VIII. Miscellaneous

Class Actions

- *Gerlich v. U.S. Dept. of Justice*, 659 F. Supp. 2d 1 (D.D.C. Sept. 16, 2009). A putative class filed suit against the U.S. Department of Justice alleging they were discriminated against because of their political affiliations. Judge Bates stayed issues of class certification to consider the DOJ's motion to dismiss. Judge Bates granted the DOJ's motion as to the plaintiffs' *Bivens* claims because the plaintiffs had a statutory remedy under the Civil Service Reform Act, but denied the motion as to the plaintiffs' Privacy Act claims for alleged violations of their First Amendment rights.

- *Moore v. Napolitano*, 2010 U.S. Dist. LEXIS 78562 (D.D.C. Aug. 4, 2010). Plaintiff employees of the United States Secret Service brought suit under Title VII for racial discrimination in selections for competitive positions, discipline, transfers, assignments, testing and hiring, and sought class certification. The court found that the class of 120 members was sufficiently numerous to satisfy Rule 23(a)(1), and that the class' consistent allegations of discrimination raised an inference of a discriminatory policy, satisfying the commonality requirement of Rule 23(a)(2). However, the class, which included only employees who participated in the bidding process, did not satisfy the typicality requirement under Rule 23(a)(3) because their claims were not typical of employees who were deterred from the bidding process entirely. The class also did not satisfy the adequacy of representation requirement because it included former and current supervisors who were "personally and substantially involved in the very promotion process that plaintiffs claim is discriminatory."

Class Actions: Administrative Remedies

- *Artis v. Bernanke*, 630 F.3d 1031 (D.C. Cir. 2011) A group of current and former secretaries filed a class action suit against the Federal Reserve Board for alleged racial discrimination in violation of Title VII. The District Court dismissed their complaint for failure to exhaust administrative remedies because the group "declined to cooperate with the Board by failing to provide any meaningful information about specific instances of discrimination." While the motion to dismiss was still pending before the District Court, the group initiated a new round of counseling, alleging that African-American secretaries received lower wages and smaller bonuses, and were promoted less frequently than non-minority secretaries. In an opinion by Judge Brown, the U.S. Court of Appeals for the D.C. Circuit reversed, holding that the information collectively provided by the group in the second round of counseling demonstrated a pattern and practice of discrimination, and was sufficient to give the Board an opportunity to investigate and attempt to resolve the group's claims.

Sovereign Immunity: WMATA

- *Bailey v. Wash. Metro. Area Transit Auth.*, 696 F. Supp. 2d 68 (D.D.C. Mar. 17, 2010). WMATA moved to dismiss claims brought by a plaintiff employee for violations of Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act, claiming sovereign immunity. Judge Urbina held that WMATA enjoyed sovereign immunity under the Eleventh Amendment, and that sovereign immunity applies regardless of whether a plaintiff's suit is for monetary damages or other relief, such as injunctive relief under the ADA. Judge Urbina then granted WMATA's partial motion to dismiss.

Choice of Law

- *Schuler v. PriceWaterhouseCoopers*, LLP, 595 F.3d 370 (D.C. Cir. Feb. 16, 2010). The trial court dismissed all counts under the New York Human Rights Law for failure to state a claim for which relief could be granted. The lower court relied upon the so-called "impact" rule, that is, a non-New York plaintiff had to allege actual impact of the discriminatory act in New York. In contrast, in a related case, the Court of Appeals had held that it is enough that a discriminatory act occurred in New York. *See Schuler v. PriceWaterhouseCoopers, LLP*, 514 F.3d 1365, 1378 (2008). The court found that the allegation that Defendant did not promote him because it has a policy of promoting only younger employees, and the assertion that the company is headquartered in New York, Plaintiff was entitled to a "reasonable inference" that the alleged policy was adopted in New York. When Defendant attempted to distinguish the reasoning of *Schuler I*, arguing that it did not control because it addressed only the employer's adoption and maintenance

of a discriminatory policy, not the discrete decision not to admit to partnership, the court responded as follows: “Pettifoggery and piffle!”

- Robert B. Fitzpatrick, *Which State Law Applies?: Multi-Jurisdictional Conduct and State Employment Law Statutes*, http://www.robertbfitzpatrick.com/papers/WhichStateLawApplies-StateEmploymentLawStatutes.pdf

Settlement Agreements: Voidable

- *Schmidt v. Shah*, 696 F. Supp. 2d 44 (D.D.C. Mar. 17, 2010). A pro se plaintiff employee sued the Administrator of the United States Agency for International Development, claiming, *inter alia*, that a settlement agreement between the plaintiff and USAID from a previous employment discrimination suit, was invalid. Judge Kollar-Kotelly upheld the settlement, finding that even if the agreement was voidable as the plaintiff claimed, by accepting the benefits of the agreement he waived his alleged right to void it.

Settlement Agreements: Rescission; Conflicts of Interest

- *Duma v. Unum Provident*, 2011 U.S. Dist. LEXIS 29121 (D.D.C. 2011). A pro se plaintiff moved the court for rescission, or in the alternative, for reformation of her voluntary dismissal of her ERISA, RICO, First Amendment, and Sarbanes-Oxley Act claims. At one point in the litigation, the plaintiff had been represented by two attorneys from Hogan & Hartson for the limited purpose of mediation and settlement. The plaintiff’s motion was based on her allegations that a conflict of interest existed because the defendant’s President had a brother who was a partner at Hogan & Hartson, and that she agreed to a settlement under duress. Judge Friedman denied the motion, finding that the partner/brother at Hogan & Hartson had no involvement in the case, that disqualification is personal and is not imputed to members of firms with whom lawyers are associated, and that there was no evidence that the plaintiff signed the settlement agreement against her free will.

Legal Malpractice

- *Martin v. Ross*, 6 A.3d 860 (D.C. Cir. 2010). Appellant attorneys and law firm appealed a judgment in the Superior Court of the District of Columbia finding them liable for legal malpractice. The appellants had represented a client in a discrimination action against his employer, and the attorneys had failed to respond to a motion to dismiss. In an opinion by Judge Nebeker, the U.S. Court of Appeals for the D.C. Circuit affirmed the lower court’s decision, finding that a reasonable juror could have found that the client would have prevailed in his discrimination suit but for the attorneys' breach.